84-904

Office-Supreme Court, U.S.
FILED
DEC 3 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

In The Supreme Court

OF THE

United States

OCTOBER TERM 1984

J. H. McQUISTON,
Petitioner,
vs.
THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

B. ALAN DICKSON
KAUFMAN, FRANKLIN & DICKSON
Century Park Center
9911 West Pico Blvd., Suite 650
Los Angeles, California 90035
Telephone: (213) 553-3351
Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

9-4-84

QUESTIONS PRESENTED

I. Is it proper for a Court of the United States, to which a dispute of a "private" (commercial, for-profit) contract of the United States is first referred, to refuse to adjudicate the facts and law *de novo*, thus contravening the prescription of Article III of the Constitution, requiring the Court to exercise the judicial power in such disputes by a judge holding office according to the requirement of Article III?

II. Is it proper for any party to a mandatory Defense Production Act contract (50 U.S.C. App. §§ 2061 et seq.) to revoke unilaterally the immunity from penalties statutorily conferred upon every mandatory contractor by that Act, and without referring the determination of liability and imposition of penalty to the statutory enforcer prescribed by the Act?*

---

*The parties involved in the proceeding sought to be reviewed are solely those appearing in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
Questions presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	4
Statement of the Case	7
1. General	7
2. Administrative Review	9
3. Action in Court	14
Reasons for Granting the Petition	17
I	
It Is Constitutionally Impermissible for a Court of the United States to Refuse to Adjudicate, at First Impression, the Facts and Law for a Party to a United States Contract in Dispute With Another Party to the Contract	19
II	
It Is Improper for Any Party to a Mandatory DPA Contract to Impose or Enforce Any Non-Performance Penalty Except as Prescribed by DPA Itself	25
Conclusion	34
Appendix A Final Decision, Court of Appeals for the Federal Circuit	A-1
Appendix B Initial Decision, ASBCA	A-2
Appendix C Final Decision, ASBCA	A-47
Appendix D Uncertified Order, Court of Appeals for the Federal Circuit	A-53
Appendix E Initial Decision, Court of Appeals for the Federal Circuit	A-54

TABLE OF AUTHORITIES

Page

Acorn Iron v Bethlehem Steel Co., 96 F Supp 481 (E.D. Penn 1951) 27, 28, 29, 30, 31, 33, 34

Chisholm v Georgia, 2 U.S. 419 (1793) 20

Eastern Air Lines v McDonnell Douglas, 532 F2d 957 (5 Cir 1976) 31

Ford v Estelle, 740 F2d 374 (5 Cir 1984) 24

Georgia v Brailsford, 3 U.S. 1 (1794) 20

I.N.S. v Chadha, ____ U.S.____,103 S Ct 2764, 51 LW 4907 (1983) 15, 20

Lynch v U.S., 292 U.S. 559 (1934) 22, 23

New York Times v U.S., 403 U.S. 713 (1971) 23

Northern Pipeline v Marathon Pipe Line, 458 U.S. 50 (1982) ..... *passim*

Pacemaker v Instromedix, 725 F2d 537 (9 Cir 1984) (en banc) 24

Springer v Philippine Islands, 277 U.S. 189 (1928) 20

U.S. v Mitchell (Mitchell II), ____ U.S. ____, 103 S Ct 2961, 51 LW 4999 (1983) 21, 22, 23

U.S. v Utah Construction Co., 384 U.S. 394 (1966) 24

Wharton-Thomas v U.S., 721 F2d 922 (3 Cir 1983) 24

Youngstown Co. v Sawyer, 343 U.S. 579 (1952) 20, 23

Constitution:

Article II 20

Article III ..... *passim*

Amendment V 3, 27, 28

Amendment VII 3, 24

Amendment IX 3, 20

Amendment X 4, 20

TABLE OF AUTHORITIES

Page

Statutes:

28 U.S.C. § 1254 ..... 1, 2
§ 1295 ..... 6, 14, 19
§ 1346 14
§ 1491 ..... 10, 14
§ 1631 15

41 U.S.C. § 322 29

41 U.S.C. §§ 601 et seq (Contract Disputes Act) 9

50 U.S.C. App §§ 2061 et seq (Defense Production Act) ..... *passim*

P.L. 94-583 (Foreign Sovereign Immunities Act) 14, 16, 23

P.L. 95-598 (Bankruptcy Reform Act) 14, 22

P.L. 97-164 (Federal Courts Improvement Act) 14, 19

Code of Federal Regulations:

32 C.F.R. 7-103.11 27

7-103.12 10

Miscellaneous:

California Civil Code § 1670 24

Hamilton: *The Federalist* No. 81 ..... 22, 23

H.R. Rep No. 94-1487, 94th Congress (1976) 23

26 Dept. State Bulletin 984 (1952) 23

Senate Banking Committee, 89th Congress: *Hearings on Defense Production Act Amendments* (1966) 26, 27

No. _____

In The Supreme Court

OF THE

United States

OCTOBER TERM 1984

J. H. MCQUISTON,
Petitioner,
VS.
THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, J. H. McQuiston, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on July 20, 1984 and denied rehearing on September 5, 1984.

OPINIONS BELOW

The order of the Court of Appeals for the Federal Circuit (CAFC), unreported, denying rehearing/ rehearing/en banc appears herein as Appendix "A". The opinion of the Armed Services Board of Contract Appeals (ASBCA), on which the Court of Appeals based its opinion, appears herein as Appendix "B". The opinion of ASBCA denying rehearing of its opinion appears herein as Appendix "C". The order of CAFC denying motion for joining parties and withholding certificate per 28 U.S.C. § 1254(3) appears herein as Appendix "D". The opinion

of CAFC denying original jurisdiction and affirming ASBCA appears herein as Appendix "E".

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit (CAFC) was entered on July 20, 1984. The timely request for rehearing and suggestion for rehearing en banc was denied September 5, 1984. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked per 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III Secs. I & II

> "Sec. I. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish; the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> "Sec. II. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to

controversies between two or more states; — between a state and citizen of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VII

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be re-examined in any court of the United States, than according to the rules of the common law."

Amendment IX

"The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTES INVOLVED

Defense Production Act

50 U.S.C. App. § 2157

"No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner."

50 U.S.C. App. § 2151(b)

"(iv) In administering this Act, special provision shall be made for the expeditious handling of all requests, applications, or appeals from small-business enterprises."

50 U.S.C. App. § 2156

"(a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts

or practices which constitute or will constitute a violation of any provision of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(b) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense

incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General."

Judicial Procedure

28 U.S.C. § 1295

"(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —

(9) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. § 607(g)(1)).

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may seem proper and just."

STATEMENT OF THE CASE

1. General

The U.S. Army Missile Command engaged in sales-for-profit of various equipments to various "wholesale customers" (as the Command called them) other than the United States. The Command habitually procured its salable stock by invoking the Defense Production Act (DPA), 50 U.S.C. App. §§ 2061 et seq., which requires those solicited to participate or suffer pain of fine, imprisonment and withdrawal of the right to procure and sell materials. The Act specifically segregates the Command from the Sovereign or "public" power, and specifically prohibits the Command from ordering in excess of its immediate needs. Moreover, persons who discover that the Command's orders are in *excess* of its needs are required *not* to deliver the orders.[1]

Petitioner McQuiston was aggrieved in two discrete ways by the operation of DPA as utilized improperly by Command and as reviewed by the administrative and judicial bodies. First, the McQuiston proprietorship, a very small business, was unilaterally designated by the Command as the industrial base for the product involved herein, was sent unsolicited orders which by law it was not at liberty to refuse, and then — despite many years of faithful service producing such products — was penalized for alleged default despite DPA's express prohibition of such penalties and in derogation of DPA's specific enforcement mechanisms. This is the genesis of the second Question Presented.

Second, McQuiston in trying to exhaust administrative relief from the improper penalties was thrust involuntarily into the "Disputes" procedure, inhibiting his right to

---

[1]It is a DPA crime for anyone to order or deliver in excess of need. 50 U.S.C. App § 2073.

Article III adjudication although the contract containing the "Disputes" clause had been imposed unilaterally and had not been freely entered into. This is the genesis of the first Question Presented.

On December 17, 1979 the Command, after placing mandatory-acceptance orders per DPA and receiving from McQuiston deliveries in excess of its needs, terminated the open balance for "partial default". The Command assessed a penalty neither consistent with (1) the contractual protection guaranteeing McQuiston's just compensation for parts delivered, nor (2) the statutory protection guaranteeing McQuiston's immunity from penalty and forfeiture.

The Command effected a "partial default" by (1) encouraging the sole-source manufacturer of a Command-specified proprietary component (materialman) not to abide by McQuiston's DPA contract with that materialman, and (2) prohibiting McQuiston from deviating from the Command's arbitrary technical and contractual requirements for the product, thereby barring McQuiston from any other source.

The Command's motivation for its monopolistic maneuver against McQuiston, apparently violating regulations & statutes upon whose conditional authority the United States allowed the Command to make commercial DPA contracts, can probably be explained thusly:

The Command's "wholesale customers" recoiled at the Command's exorbitant markup of spare parts it was reselling to them (tripling the acquisition price but adding no value) just like Congress objected recently when it heard of paying $7,000 for coffeepots and $500 for claw hammers. Reacting in 1978, the Command attempted to *raise* the acquisition price of the components it bought for resale, by deliberately trying to order on a sole-source basis only from costly suppliers, thereby driving other

sources out of business. McQuiston initially was merely one low-cost supplier who would be eliminated, to mollify the "customers" by lowering the Command's paper profit. But McQuiston in 1979 was a "whistleblower", exposing unlawful practices of his contracting officer and forcing corrections. Thereafter, the contracting officer decided to punish McQuiston, rigging the "default" and intending McQuiston to pay for the Command's newly-revised "acquisition" cost.

Consequently, the United States was induced to "take" over $250,000 from McQuiston without exchanging value therefor. That amount was over 30 years of McQuiston's income. Moreover, the modus of taking requires the State of California to revoke McQuiston's license to practice his profession, making it impossible for McQuiston to recoup the taking, neither by continuing in business nor by working for another.

In attempting below to nullify the Command's default determination, McQuiston went unrepresented by counsel, because counsel was unavailable to him.

2. Administrative Review

McQuiston interpreted the Command's termination as a breach of contract, which under this pre-Contract Disputes Act (CDA) (41 U.S.C. §§ 601 et seq) contract was redressable only in a Court of the United States; nevertheless, those Courts generally required, as a precondition of filing, the exhaustion of administrative remedies.

On January 17, 1980, because the contracting officer and his supervisor assured McQuiston (1) that the contracting officer would undertake a reconsideration of the Command's termination, and (2) that it was feasible for the contracting officer to reinstate and complete the terminated contract, McQuiston formally requested the *contracting officer* to undertake the reconsideration. Per

the "Disputes" clause (32 C.F.R. 7-103.12(a), 1958 Jan.), the contracting officer could decide by himself such disputes before proceeding further. But instead of reconsidering as agreed, the contracting officer merely referred this breach-of-contract dispute to the Armed Services Board of Contract Appeals (ASBCA). Thus the *contracting officer* was the party actually requesting the administrative review by the Secretary.

Because of the foregoing anomalies, McQuiston, at his first opportunity, insisted that ASBCA should take care not to prejudice McQuiston's right to bring an original action in a Court of the United States, under 28 U.S.C. § 1491 or other statutes. The examiner consented.

Whereupon, ASBCA asked the Command to file what would function as a "complaint" and permitted McQuiston to pursue six defenses:

> (1) McQuiston's statutory DPA immunity bars the Command from imposing punitive termination of the parties' DPA contract for "default", absent the process prescribed by DPA itself.
>
> (2) The Command was required to provide McQuiston with expeditious handling and it failed to do so.
>
> (3) The Command unfairly interpreted its own obvious typographical error in the DPA contract papers to its advantage, refused to admit waiver, and failed to correct the error when timely due.
>
> (4) The Command unlawfully refused to correct its own defective specification when such correction became imperative.
>
> (5) The Command unfairly blocked the performance of the only materialman permitted McQuiston

by the Command, necessarily making completion impossible.

(6) The Command refused to follow the contracting and termination-of-contract regulations which were its only source of contracting and termination authority.

The examiner decided to conduct the prescribed hearing in two parts. Part one was to elicit testimony on the Command's behalf, from government employees and any other witnesses the Command wished to present. Part two was thereafter to hear evidence on McQuiston's behalf. The examiner permitted the Command to withhold its records and personnel from examination before Part one of the hearing was concluded, nor was McQuiston permitted to subpoena evidence from either the Command or third parties. Several months after the Command's witnesses were heard and Part one was concluded, the examiner *sua sponte* canceled the Part-two hearing the examiner had previously promised for McQuiston's 40 witnesses and evidence.

Inter alia, McQuiston's witnesses would have testified:

(1) the specifications (technical and procedural) imposed by the Command upon McQuiston by its mandatory-acceptance contract were imposed on no other contractor by the Command,

(2) the Command *intended* to treat McQuiston disparately,

(3) the Command discussed internally how to *conceal* its disparate treatment of McQuiston,

(4) the production failures were squarely the product of laws of nature,

(5) every rejection of material was the direct result of McQuiston's detection of an out-of-tolerance condition arising from the Command's arbitrary and unreasonable technical requirements,

(6) although the Command's arbitrary technical requirements caused the production failures, the Command could have relaxed them and assured facile production,

(7) DPA would not permit the Command to retain its arbitrary and unreasonable technical requirements in the face of production difficulties affecting the National Defense,

(8) the Command had no actual need then or ever for any parts which McQuiston failed to deliver, and

(9) the order of McQuiston's deliveries to the Command's depots had been suggested and approved by the Command and were accomplished only with the Command's surveillance and acceptance.

After the examiner prevented McQuiston from presenting witnesses on his behalf, McQuiston submitted, *inter alia*:

(1) documentary reports of 11,077 tests required by the Command, which linked every failure of acceptability to Command's arbitrary and unreasonable requirements,

(2) textbook and other literature describing the natural laws controlling the various modes of failure, and

(3) affidavits and statements verifying that (A) the component became commercially "impossible" in 1979 and (B) the Command had permitted anyone *but* McQuiston to substitute a non-conforming part thereafter.

However, McQuiston's submissions went apparently unnoticed because of a clerical error at ASBCA after they were received.

ASBCA's opinion upholding the contracting officer's unqualified right to terminate for penalties is set forth in Appendix "B". Instead of concentrating upon the statutes and procedures which the contracting officer admitted violating, the opinion cited the Board's lack of knowledge regarding facts necessary to verify the impossibility to produce, and even a lack of knowledge about the physical laws alleged to have dictated the alleged production impossibility.

Inasmuch as ASBCA based its reasoning upon contested facts, rather than upon the law and agreed facts in the manner prescribed for summary judgments, McQuiston requested a rehearing and cited the contractual right to present witnesses on his behalf. ASBCA's denial of rehearing is set forth in Appendix "C", affirming *inter alia* over McQuiston's objections:

> (1) Despite the record proving that only the Command was permitted to present witnesses, ASBCA held that "appellant's allegations that it did not have an opportunity to present its case is totally without merit."
>
> (2) Ducking McQuiston's legal argument (that because DPA prohibited processes & penalties except as specified by DPA, the Command's "Default" clause was invalid if the Command had invoked DPA in solicitation & contract), ASBCA held "the contractor must establish a causal connection between the operation of the priority system and its delay or failure to perform."
>
> (3) Referring to the failure of the Board to address the Command's violations of procedures and

the attendant "taking" of McQuiston's liberty and property without just compensation nor due process, the Board responded, "the issues in this case are those arising under appellant's (mandatory-acceptance) contract and the mutual contractual rights and obligations of the parties. We do not reach the constitutional issue of "liberty", as appellant attempts (sic) to define it, nor are we concerned with the procedures of the Administrative Procedures Act since we are proceeding under the Contract Disputes Act and the Board's Charter and Rules."

3. Action in Court

During the pendency of the administrative review, Congress enacted in 1982 the Federal Courts Improvement Act (FCIA), P.L. 97-164, severing the trial section of the Court of Claims by amending 28 U.S.C. § 1491 and suggesting that the judicial power of the United States could be exercised by judges other than those prescribed in Article III. FCIA essentially encored the adjudicatory scheme Congress enacted in the Bankruptcy Reform Act of 1978, in which the judicial power was to be exercised by judges other than per Article III.

Only injuries of *less* than $10,000 remained triable per Article III, according to FCIA and 28 U.S.C. § 1346(a). FCIA might have prevented McQuiston from bringing this transitional action to any Court of the United States, but 28 U.S.C. § 1295 provided jurisdiction in the new Court of Appeals for the Federal Circuit because the contracting officer in 1980 referred the administrative review to the Board of Contract Appeals.

The complaint argued that the "restrictive" theory of sovereign immunity, adopted formally by Congress in 1976 and approved by the President in P.L. 94-583, prevented the United States from asserting sovereign

defenses and tactics denying the Constitutional access to the judicial power, in disputes involving its "private" commercial operations such as government contracts. It also alleged that Congress designated the Court of Appeals for the Federal Circuit (CAFC) to hear the contract dispute, and that the Constitution required that the case should be heard *de novo* by a judge of the United States, but that if it was more appropriate 28 U.S.C. § 1631 permitted the CAFC to assign the case to a District Court for trial.

McQuiston pleaded that in lieu of the CAFC's declaring FCIA unconstitutional, because FCIA withdrew the provision for trial of fact by an Article III judge, it was possible for CAFC, to decide it possessed the inherent ability to hear and decide factual issues as the court of first impression. If so, only a modicum of FCIA's language need be severed. This use of severability avoids paralyzing contract disputes and applies with this Court's severability doctrine as prescribed in *I.N.S. v Chadha*, ____ U.S. ____ (1983).

Accordingly, McQuiston's "transitional" suit was framed as a verified, "original" complaint referring to the Board's opinion as merely the required exhaustion of administrative remedy that was not at all binding on the court, rather than framed as an appeal. In Memorandum, McQuiston offered *Northern Pipeline*[2] and its progeny as authority for the unusual procedure and the reason why the ordinary standard of review was inappropriate to this action.

The complaint alleged, *inter alia*, that McQuiston suffered actual contractual injury after exercising his first-amendment right to notify the Government of unlawful acts by government employees, and that the Command

---

[2]*Northern Pipeline v Marathon Pipe Line*, 458 U.S. 50 (1982).

had used DPA and procurement regulations unlawfully, damaging McQuiston as a direct consequence.

Per Appendix "D", CAFC on January 24, 1984 denied McQuiston's motion to join other parties than the United States as defendants in the action. It also refused *sub silentio* to certify the denial for immediate review by this Court.

Per Appendix "E", CAFC on July 20, 1984 denied McQuiston the trial he demanded, deciding that case law of this Court (antedating P.L. 94-583 (adoption of "restrictive" theory) and *Northern Pipeline* (requirement for de novo review)) prevented McQuiston from being heard *de novo* by an Article III Court.

The Court of Appeals implicitly decided that the agency party to a government contract was authorized to decide liability and penalize any contractual partner any amount prescribed by the agency party.

The court further decided that McQuiston willfully violated DPA (and could not retain its protection) by delivering to the Command's depots in an order the Court assumed was "wrong", but the court neglected to consider whether the order of delivery might well have been proposed or sanctioned by the Command and therefore could have been executed by McQuiston in good faith.

Citing only a DPA regulation pertaining to multi-agency resolutions of "impossible" scheduling, CAFC additionally failed to establish a factual basis for concluding that McQuiston's deliveries were impossible when *scheduled*, a fact ASBCA rejected before, rather than being subjected to disrupting events thereafter. But the Court nevertheless concluded that McQuiston's delivering on more than one contract under the control of a single contracting officer and in the order that actually occurred "was sufficient to break any pattern established

by the Government (sic) in liberally granting extensions of time for appellants' performance because of supplier difficulties."

The Court decided that the Command's abuse of procurement regulations, by which the termination for default was effected and the penalties were imposed, should not be questioned notwithstanding that "abuse of agency discretion (sic) can be the subject of board review if it pertains to a matter otherwise within the board's authority."

The Court also decided that "In view of the above, it is unnecessary to reach appellant's contentions of violations of civil rights and constitutional torts."

A timely request for rehearing and suggestion of rehearing *en banc* was denied September 5, 1984, per Appendix "A".

REASONS FOR GRANTING THE PETITION

Terminations for Default have had a disparate impact on Small Business, notwithstanding Congress' granting them special protection per 50 U.S.C. App § 2151(b) because they constitute the backbone of the Defense Industrial Base. But when a military agency is permitted to *coerce* contracts from a small business by using (1) the threat of sanctions per DPA and (2) the promise of special assistance, then the agency ought to adhere to statutory restraints, rather than leaping to impose penalties benefitting the agency without even a modicum of the process prescribed by the coercive statute. The courts should not permit an agency to manipulate DPA offensively without respecting the immunity DPA extends to those caught in its web. Yet this is exactly how DPA was used against McQuiston by the Command.

The time is now ripe for this Court to issue a writ of certiorari in a case involving abuse of DPA by an agency, because after some 34 years of practice, under which the case law in Circuits hearing civil-rights cases has *protected* DPA contractors, CAFC has unequivocally *disagreed* with granting DPA protection. There is now a major split between the Circuits.

Small Businesses cannot afford to bring injustices to the Supreme Court for redress, especially after the agency has used DPA (as is frequent) to put them out of business. This petition provides this Court with an overdue but rare opportunity to decide whether an agency party to a DPA contract has a status more privileged than any other person, which privilege permitting the agency to overrule statutes and regulations protecting the other parties to the contract.

I

IT IS CONSTITUTIONALLY IMPERMISSIBLE FOR A COURT OF THE UNITED STATES TO REFUSE TO ADJUDICATE, AT FIRST IMPRESSION, THE FACTS AND LAW FOR A PARTY TO A UNITED STATES CONTRACT IN DISPUTE WITH ANOTHER PARTY TO THE CONTRACT.

This Court in *Northern Pipeline* fully described our Founding Fathers' abhorrence of adjudicators capable of being controlled by one party to a dispute, and that the abhorrence spawned the prohibition in Article III. But *Northern Pipeline* decided a jurisdictional dispute pertaining to the Bankruptcy Reform Act, so this Court's commentary therein regarding adjudication of United States contracts was merely dicta.

Nevertheless, the parallel is unavoidable between the Bankruptcy Reform Act and the Federal Courts Improvement Act, P.L. 97-164, regarding Congress' unconstitutional delegation of the judicial power to an ineligible adjudicator. The Court's dicta in *Northern Pipeline* pertaining to United States contract disputes becomes controlling here.

But McQuiston did not request adjudication by a constitutionally-ineligible adjudicator. To the contrary, McQuiston presented the controversy to a duly-constituted Court of the United States, which Court Congress in 28 U.S.C. § 1295 specifically designated to hear contract disputes. Thus the Constitutional issue narrows to how that Court should form its decision.

Obviously an adjudicator cannot be said to have "decided" something if the adjudicator is controllable by someone else. That is why Article III insists on the economic independence of the *actual* adjudicators. And nothing in FCIA means Congress intended to withdraw

the Article III judicial power from contract cases. And neither Congress nor any other Branch may appropriate the power of another Branch. *I.N.S. v Chadha*, ____ *U.S.* ____, 51 LW 4907, 4919 (1983); *Springer v Philippine Islands*, 277 U.S. 189, 203 (1928); *Youngstown Co. v Sawyer*, 343 U.S. 579 (1952).

It is not surprising in view of Amendments IX and X that Justice Jay in *Chisholm v Georgia*, 2 U.S. 419 (1793) and *Georgia v Brailsford*, 3 U.S. 1 (1794) clearly articulated the proposition that the *citizens*, not the Executive, of the United States were the United States; accordingly, citizens should be able to invoke the judicial power of the United States against sovereigns, and sovereigns after being so summoned within the court's jurisdiction should be treated with no more deference than any other litigant. But there emerged a more prudential version of standing after the States swiftly responded with the 11th Amendment, making *some* "sovereigns" immune from summons. President Jackson's famous refusal to enforce the Supreme court's decision in *Worcester v Georgia*[3] provided further fuel. The stricture of Article II Section 3, that the President shall "take care that the laws be faithfully executed", thereafter relied simply on entreaty, since the President was in control of the Army.

Gradually, this Court refined its prudential theory, depending upon the Executive's consent to the action before the court would entertain a suit, with adjudication permitted only according to the terms and processes that were specifically consented to by the Executive.

The Court's prudential deference to the "dictatorship of the Executive" was anchored on two observations:

---

[3] 310.5. 515(1832). "John Marshall has made his decision; now let him enforce it."

(1) The Magna Carta was obtained not by judicial ruling but by force of superior arms, and the United States judiciary possessed no arms to enforce its decisions. Thus the judiciary required the Executive's cooperation, if opinions of the Court were to have any practical force and effect.

(2) The Executive and Legislative Branches acting in concert could contravene the Constitution unhindered by any judicial comment intended as a restraint; nor would the Executive be removable for contempt of court in such circumstances.

But these prudential considerations should not deter this Court in the case at bar, for reasons discussed below.

Congress has never indicated that it would support the Executive in an argument over Executive (Sovereign) immunity regarding the Executive's *commercial* activities. By enacting the Tucker Act, Congress provided a complete waiver of "sovereign immunity" regarding contract disputes. See, e.g., *U.S. v Mitchell* (Mitchell II), ____ U.S. ____, 51 LW 4999 (1983), where the Court said:

> "In at least two recent decisions this Court explicity stated that the Tucker Act effects a waiver of sovereign immunity. *** The existence of a waiver is readily apparent in claims founded upon 'any express or implied contract with the United States.' 28 U.S.C. § 1491. The Court of Claims' jurisdiction over contract claims against the government has long been recognized, and government liability in contract is viewed as perhaps 'the widest and most unequivocal waiver of federal immunity from suit.' *** The same is true for claims founded upon executive regulations. Indeed, the Act makes absolutely no distinction between claims founded upon contracts and

claims founded upon other specified sources of law." 51 LW at 5002.

Thus for any contract consummated before FCIA was enacted in 1982, Congress clearly provides no intent to support the Executive in a plea of immunity. There is no reason for prudence regarding this 1979 contract dispute.

Moreover, FCIA contains nothing to support a claim that it was *not* accidental when Congress, in reorganizing the Court of Claims, broke the express link providing Article III Judges with oversight of United States contract disputes; nor is there any other indication that Congress meant to *withdraw* the constitutionally-prescribed relief. For example, when it mended the unconstitutional language in the Bankruptcy Reform Act, Congress *conformed the Act* as prescribed by Article III and *Northern Pipeline*, rather than by withdrawing the Article III relief. Undoubtedly Congress would respond similarly for FCIA because of the parallel between the two Acts. Moreover, most proceedings upon which FCIA focused are constitutionally justiciable in the Legislative Court provided by FCIA, because those proceedings will not *require* the exercise of the judicial power of the United States.

Nor should the force of the Executive's superior arms suggest caution, as it did in the time of President Jackson. While in *Lynch v U.S.*, 292 U.S. 571, 581 (1933), this Court retained the rationale of Hamilton's *Federalist*, No. 81, saying "The contracts between a Nation and an individual are only binding on the conscience of the Sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will", nowadays the Executive regularly accepts adverse court decisions, even those affecting the exercise of military force. See, e.g, *Youngstown Co. v Sawyer*, 343 U.S. 579 (1952) (adjudication against Executive who

seized mills using military force); *New York Times v U.S.*, 403 U.S. 713 (1971) (adjudication against Executive who intended to suppress adverse military data); *U.S. v. Mitchell*, supra (adjudication against Executive for breach of duty).

Moreover, after Congress ratified in P.L. 94-583 the "restrictive" theory of sovereign immunity in 1976, as it was explained in H. Rep Report 94-1487 (1976 U.S. Code Cong & Adm News at 6604), there is no basis for this Court to reach for sovereign immunity in actions over "private" or commercial contracts (jure gestionis) of United States agencies. The Executive rejected such immunity as early as 1952, issuing the "Tate Letter" (26 Dept State Bull 984), by which "sovereigns" no longer could retain the ability to repudiate their contracts as described in *Lynch* and *The Federalist*.[4]

Furthermore, government contracting today is a giant operation which produces some 12 million contracts every year. The sheer volume renders it impossible for the Executive to monitor the acts of every contracting officer, and mistakes will occur. Some of these mistakes, perhaps involving DPA, will entangle lines of authority; modern Management Theory will render the Executive unwilling to extricate itself without the help of the judicial power of this Court. Therefore, the fact that the Executive formally "opposed" the case below shouldn't raise a separate barrier to a writ of certiorari.

Despite the benign portents, CAFC plainly refused to adopt McQuiston's constitutional argument releasing that Court from the prejudicial constraints of the Board. CAFC cited as authority only a decision of this Court[5] antedating congress' adopting the "restrictive" theory.

---

[4] Noticed in Verlinden v Bank of Nigeria, ——U.A. ——(1983).

[5] *U.S. v Utah Construction Co*, 384 U.S. 394 (1966)

In certain factual settings, binding the Court to the influence of a non-party would be appropriate. For example, amendment VII prescribes fact-finding by a jury, at the parties' option in such cases, and prohibits a court from re-examining a fact tried by such jury. Likewise, the parties might refer their dispute to a mutually-acceptable arbitrator, which need not be a Court of the United States. But when a case is "assigned from Article III jurisdiction to another forum, both the rights of the parties and the relations between the separate branches of the government are implicated." *Pacemaker v Instromedix*, 725 F2d 537, 541 (9 Cir 1984) (en banc). In a DPA mandatory-acceptance contract, elicited from one party by threat of punishment, clearly no contract clause of the mandating party can be called consensual for the purpose of establishing waiver of Article III protection. "Waiver of personal rights must be freely and voluntarily taken." *Pacemaker* at 543; *Accord, Wharton-Thomas v U.S.*, 721 F2d 922 (3 Cir 1983); *Ford v Estelle*, 740 F2d 374 (5 Cir 1984).

McQuiston is subject also to the laws of California. California recognized the pernicious temptation of sovereigns to provide for "arbitration" by personnel controlled by the sovereign. Accordingly, California Civil Code § 1670 specifically invalidates any contract clause by a public agency which would permit the public agency's employee or agent to arbitrate a dispute arising under that contract, and prescribes mutual assent to remove any dispute from a court of competent jurisdiction.

By its contrary decision in the case at bar, CAFC set itself apart from all other Circuits which have considered the issue of non-consensual removal, and raised a disagreement with this Court's dicta in *Northern Pipeline*. Unless this Court harmonizes the split in the Circuits, some 12 million contracts per year will be saddled with a

withdrawal of their constitutional rights. The only remedy left would be if the contract disputants are able to divide their claims into separate actions of less than $10,000 each and to thereby avoid the anomalous CAFC.

Therefore, every prudential consideration in the case at bar urges this Court to issue the writ of certiorari and settle the first question.

II

IT IS IMPROPER FOR ANY PARTY TO A MANDATORY DPA CONTRACT TO IMPOSE OR ENFORCE ANY NON-PERFORMANCE PENALTY EXCEPT AS PRESCRIBED BY DPA ITSELF.

This issue was heretofore decided in the *affirmative* by every court to whom the question was posed since World War I, including the Court of Claims. However, CAFC's opinion in the case at bar departed from those prior decisions. Because agencies unilaterally demand penalty clauses as a matter of course in over 12 million of their DPA contracts every year, and DPA forces contractors to accept those contracts under pain of imprisonment and other penalties, the validity of an agency penalty clause in a DPA contract is a substantial question which has created a significant split between the circuits. It is only resolvable by means of a writ of certiorari by this Court.

Hornbook law prefers the interpretation of Circuits other than CAFC, and McQuiston testified and offered documents showing that he relied on his prior DPA experience, which of course followed the hornbook law, but the Command defended by advancing the proposition that the hornbooks are *legally* mistaken. Thus the question was suitable for summary judgment because it is not fact-bound.

If this Court decides that a party is free to prescribe penalties other than the law authorizes, in a contract which the law authorizes it to force upon another party, then the Command was correct in its position.

If this Court decides that a party may not prescribe penalties in such contract except as per statute, then McQuiston was correct.

Congress intended that DPA will keep the United States militarily prepared and defensible, by abrogating the right to refuse to sell materials and services *actually* required for National Defense. The Congressional intent is clear not only in the statutory language but also in the legislative history.[6]

It is unquestionable that the United States has the irresistible right to take property per Amendment V of the Constitution. Taking property for National Defense

---

[6]See, e.g, 50 U.S.C. App §§2071(a), 2156(a), and 2157. See also *Hearing on DPA Extension*, 89th Cong Senate Banking Committee, June 23, 1966, testimony of Asst Adm for Industrial Mobilization:

> "Mr. Bertsch: We set aside, Mr. Chairman, 13 percent of the domestically refined copper, copper refined from domestic ores, which is 36-cent copper, for defense use, so as to assure 36-cent copper for the defense effort.
>
> "Senator Douglas: Suppose the companies don't want to sell?
>
> "Mr. Bertsch: They have to sell.
>
> "Senator Douglas: They have to sell?
>
> "Mr. Bertsch: They have to sell to the military, under our priorities system.
>
> "Senator Douglas: Even though they can get 62 cents in the open market?
>
> "Mr. Bertsch: They must sell under our priorities system. They must fulfill our defense needs under Title I of the DPA. Every order that is issued by the Department of Defense carries a priority rating, and it must be fulfilled." *Hearing*, at 16.

through the medium of a DPA contract is merely an exercise of that Fifth-Amendment right.

A restatement of the question McQuiston presents to this Court is therefore: May an agency penalize a person unilaterally because the person does not possess what the agency *wanted* to take in the name of the United States, or must the agency defer to the process and penalty prescribed by the *United States* in such situations?

Less than nine months after DPA was enacted, the definitive hornbook case decided this question. In *Acorn Iron v Bethlehem Steel*, 96 F Supp 481 (E.D. Penn 1951) Bethlehem Steel refused to supply material to a fabricator, damaging the fabricator which had invoked DPA with its order. The fabricator sued for injunctive and compensatory relief, alleging non-performance of contract. But the Court decided that the contractural relief specified by the ordering party in the DPA contract would be inapplicable, because of the duties imposed upon the supplier by the Act itself. Remedy would have to be found within the *statute*.

McQuiston argued below that *Acorn* controlled and invalidated the Company's penalty clause in the contract imposed upon McQuiston (32 C.F.R. 7-103.11, 1969 AUG), because the clause did not conform to the DPA. While the Command was free to offer and enforce contracts containing such a clause to non-DPA contractors, it was prohibited from enforcement except in accordance with DPA because the Command invoked DPA beginning in the solicitation papers. McQuiston argued that the solicitation, containing reference to DPA authority, was an actual and/or potential 5th-Amendment taking; events flowing from the solicitation were colored thereby and thus protected by statute.

Acorn clearly controls such a case between ordinary parties. It clearly and succinctly decided that Bethlehem

had violated the duties imposed upon it by the Act and regulations, but it pointed out that the Act specifically prohibited the actual parties to a DPA contract from imposing penalties upon each other for nonperformance, notwithstanding any violation.

The *Acorn* decision remains hornbook law 33 years later. The Command argued, and the argument was upheld by CAFC in the case at bar, penalties imposed by an *agency* that is party to a DPA contract have validity even though penalties imposed by *other* parties to the contract do not. Thus, opined CAFC, if McQuiston delivered parts on a United States contract for a Command project *before* McQuiston delivered parts on *another* United States contract for the *same* Command project, then regardless of the circumstances of the deliveries the Command is entitled to assess such penalties as it determines are appropriate. But McQuiston would be unable to penalize in turn the non-performing supplier, because of *Acorn*; he would be left with *no* redemy at all.

It should be obvious that CAFC's new interpretation of CAFC reads important language out of the statutes and undermines an involuntary contractor's 5th-Amendment rights to just compensation and due process of law. This Court has never permitted these rights to be lightly taken away.

The controversy in *Acorn* was between two parties, neither of which was a United States agency. However, Acorn as plaintiff insisted that it was representing the interest of the United States by its action, and therefore the *Acorn* court analyzed DPA and the legislative history as if a contracting agency had filed the suit. The Court nevertheless prohibited penalties to be imposed except as prescribed by the statute.

United States *agencies* party to DPA contracts are specifically defined as "persons", made subject all the

requirements in the Act per 50 U.S.C. App § 2152(a) (except "no punishment provided by this Act shall apply to the United States"), and are not entitled to deference and extraordinary powers. If this Court on writ of certiorari applies the *Acorn* doctrine to the case at bar, it will merely affirm a proposition which heretofore has been accepted as law in *every* circuit but CAFC, but which heretofore has not been accepted as law by government *agencies* party to DPA contracts.

In rendering its opinion, CAFC relied upon no case law;[7] it merely referred to a textbook dealing with DPA as if it were a separable appendage in government contracts. But if a party has been coerced by DPA's threat of fine and imprisonment into a contract to deliver something, and a contract clause makes the party responsible for the performances of whatever materialmen are specified and controlled by the forcing party, then the extent of DPA's taking extends far *beyond* the property of the prime contractor. Therefore, DPA cannot be treatable as an appendage; it is an integral part of, and controls, the party's every act or failure-to-act at every stage of the solicitation and contract. Even the party's ability to demand quotations from materialmen is predicated upon DPA, just like the Command's ability to demand the quotation from the prime contractor is predicated upon DPA. And 50 U.S.C. App § 2157 speaks to the power to elicit responses to solicitations when it prescribes:

> "No person shall discriminate against orders or contracts to which priority is assigned *** by charging higher prices or by imposing different terms and conditions *** or in any other manner."

---

[7]Because 41 U.S.C. § 322 denies *legal* finality for any Board decision, CAFC was not "relying on case law" by quoting Board "authorities".

Moreover, DPA anticipates that certain contracts will eventually prove impossbile to complete. In such cases, 50 U.S.C. App § 2155(b) provides that the "immunity granted herein from prosecution and punishment and from any penalty and forfeiture shall not be construed to vest in any individual any right to priorities assistance, to the allocation of any materials, or to any other benefit which is within the power of the President to grant under any provision of this Act." In other words, whenever McQuiston found a barrier to production, the President was not *required* to remove the barrier, but neither did DPA permit the Command, nor McQuiston, to cancel the uncompleted balance for *default* and thereby impose penalties and forefeitures because of that barrier. Within those limits the parties were free to seek alternative remedies, such as a termination for convenience, relaxation of technical and contractual barriers, or voluntary priorities assistance.

The *Acorn* court properly refused to allow the interest of the United States to be adjudicated or prosecuted any party to the contract in dispute. There is a basic unfairness in permitting one who covets another's property to sit in judgment over the other and thereby to take the coveted property. According to the *Acorn* court, after contracting agencies pleaded for such DPA power Congress specifically withheld it, entrusting that power to a separate, central agency not under the control of the Defense Department. In fact, DPA itself is controlled by the Banking committees, not the Armed Services committees of Congress, an extra precaution against unfair treatment of contractual partners by the procuring agencies.

Moreover, DPA is designed to react quickly to changing events affecting the National Defense. Hidebound procedure could result in our Country's defenders being

overrun by an advancing enemy. Thus, courts always recognized that informality of procedure and voluntary cooperation are linchpins of DPA contracts. See, e.g, *Eastern Airlines v McDonnell Douglas*, 532 F2d 957, 981-998 (5 Cir 1976), and cases cited therein. Without protective immunity an involuntary contractor could easily be bilked by agencies issuing informal instructions which later the agency might have forgotten while accusing the contractor of wrongdoing. Clearly, the *Acorn* rule is necessary to safeguard the National Defense from being *sabotaged* by the ordinary confusion connected with large procurement agencies.

Reviewing the case at bar, it is easy to see why the *Acorn* rule is appropriate here. The Command divided its stock-in-trade between several depots. For the purposes of replenishment, each depot's reorders were processed as separate purchase requisitions. Nevertheless, all requirements were coordinated by a single contracting officer and combined for actual procurement from vendors. One depot's requisition was unfortunately excluded from McQuiston's 1978 contract, necessitating an advertisement and contract in 1979 for the single depot just to correct the mistake. That depot's contract was necessarily received later than the other. But thereafter, the depot apparently needed an earlier delivery. Nothing in DPA prevented the contracting officer from asking McQuiston, to deliver to the needy depot first, telephonically.

According to DPA, *impossible* orders must be scheduled in the order of receipt, but all other orders can be scheduled in any order. Idiotically interpreted, this might seem to provide a bar to revising depots' order of delivery once the contracts have been issued, even though the materials are for the same project. But obviously the contracting officer will telephone the contractor, tell the

contractor to revise the order of shipment, and the contractor will comply with the telephone request. Moreover, at the time of shipment the government inspector will check for the proper order of shipment. The inspector will certify on DD Form 250 (required by the Command's contract) that the shipment complies with the terms of the contracts, including shipment in the desired order, or else the government will not accept the material.[8]

In the case at bar there was evidence that there was displeasure between contracting officer and McQuiston. McQuiston had "whistleblown" the contracting officer, not once but *several* times and over a lengthy period in 1978-79. The contracting officer thereafter was required to engage McQuiston in the Command's further commercial activities despite the office's efforts to the contrary. How easy it would be for that office to retaliate against McQuiston for penalties, by placing phone messages to McQuiston and his known sole materialman! The ensuing default penalty if unilaterally assessable would relieve the contracting office of the necessity for dealing thereafter with this contractor, who was now a "troublemaker". How easy to move against this professional engineer, who was known to have no employees liable to be witnesses, and who was known to be subject to suspension of his professional license for such a "default"![9]

But as *Acorn* decided, a person is not liable for any "act or failure to act", except after being duly found by specified process to have wilfully violated the Act. And 50

---

[8]The Board relied on evidence also proving that the inspector *approved* the order of shipments, and accepted the material.

[9]The actual facts were never brought forth. For purpose of showing why McQuiston needed the statutory protection, it matters little where the truth lies.

U.S.C. App § 2156(b) prescribes that "all litigation arising under this Act or the regulations promulgated thereunder shall be under the supersivion and control of the Attorney General." It furthermore specifies that civil actions in such cases shall be conducted in District Courts, which shall have jurisdiction of "all civil actions under this Act to enforce any liability or duty *created* by, or to enjoin any violation of, *this Act*, or any rule, regulation order, or subpena thereunder." therefore, the Command should have had *no* standing to prosecute, enforce, or cause to enforce the penalty that is called "termination for *default*" against McQuiston's DPA contract, and certainly the Command was not authorized to enforce such penalty by convening a proceeding in ASBCA.

Acorn said that *no* DPA party could assess penalties in lieu of the District Court:

> "Had the Congress intended the result contended for by plaintiff, it would have been an easy matter to so provide and in very simple words. That this was not the intent of the Congress is apparent from the Act as a whole and from the legislative history as gleaned from conference Reports and the Congressional Record. The plain meaning of the words used is wholly consistent with the policy expressly declared by the Congress in Section 2, 50 U.S.C. App § 2062." 96 F Supp at 482.

It further declared:

> "Since the Act imposes duties on the defendant in derogation of its common law right to sell or refuse to sell to anyone for any or no reason, the Act must be strictly construed. Where a statute imposes new duties or creates new rights, the penalties and remedies must be found within the statute. *** From the statute and the legislative history it is apparent that Congress sought to and did effectively limit the

> enforcement of the Act and effectuation of its policy to the President and those to whom he duly delegated his powers. *** If the plaintiff is aggrieved by defendant's conduct his recourse is the National Production Authority and, if circumstances warrant, through it to the Courts." 96 F Supp at 482.

Moreover, because under the "restrictive" theory of sovereignty the Command is not sovereign when it engages in commercial contracting for-profit, the Command could not possibly lay claim to the "public" enforcement powers of the Attorney General specified in DPA.

Therefore, every prudential consideration in the case at bar urges this Court to issue the writ of certiorari and settle the second question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

B. ALAN DICKSON
KAUFMAN, FRANKLIN & DICKSON
Attorneys for Petitioner

Date December 3, 1984

Appendix A

United States Court of Appeals
for the Federal Circuit
No. 84-578
J. H. McQUISTON,
Appellant,
vs.
THE UNITED STATES,
Appellee.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

GEORGE E. HUTCHINSON,
CLERK

Date September 5, 1984

Appendix B

ARMED SERVICES BOARD OF CONTRACT APPEALS
ASBCA No. 24676
Appeal of — McQuiston Associates
Under Contract No. DAAH01-79-C-0179

APPEARANCES FOR THE APPELLANT:
Mr. J. H. McQuiston, President

APPEARANCES FOR THE GOVERNMENT:
Colonel C. T. Lakes, JAGC
Chief Trial Attorney
Major W. Eric Pedersen, JAGC
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GOMEZ

This timely appeal is from the default termination of a supply contract for pulse forming networks, radar components of the Hercules Missile System. Appellant, having elected to proceed under the Contract Disputes Act, contends that its failure to deliver was excused because respondent's specifications were defective. Appellant also argues it is further excused by respondent's failure to follow the correct regulatory procedure for contract termination and for priorities assistance, and by respondent's interference with its subcontract relationships. Finally, appellant contends that it was entitled to a longer period for contract performance insofar as respondent led appellant to believe that the contract delivery date would be extended as was done on earlier contracts. Respondent rejects all of these contentions arguing simply that appellant's failure to deliver the supplies within the contractually specified time was within its control and not without its fault or negligence.

FINDINGS OF FACT

Background

1. Contract DAAH01-79-C-0179, in the amount of $168,588.00, was awarded to appellant on 20 December 1978. The contract required appellant to deliver 216 pulse forming networks within 300 days of award, *i.e.*, by 16 October 1979 (R4, tab 1). By 17 August 1979, appellant had delivered and the Government had accepted 112 networks (R4, tab 55), leaving a balance due in the two remaining months of 104 units; these were not delivered by the 16 October 1979 delivery date. On 7 November 1979 the Contracting Officer issued a show cause letter (R4, tab 15), and the contract was terminated for default on 17 December 1979 (R4, tabs 2, 24). Appellant has timely appealed that decision. (R4, tab 27)

2. The history of the procurement of the pulse forming network goes back to 1964. Prior to award of the instant contract appellant had already participated in the earlier phases of the procurement history of the network. Between 1964 and 1980, 15 contracts involving more than 2100 networks were awarded; at least one, and sometimes two, contracts were awarded in a single year, except for a hiatus in 1969 and in 1975-1977, for quantities ranging from 20 to 300 units. During this period, the record indicates that while Western Electric was the original supplier of the networks, appellant received the major share of awards (R4, tab 76; tr. 1618). Four contracts were awarded to appellant between 1964 and 1966 and six between 1971 to 1974; these were either advertised or negotiated fixed price contracts. During the period between 1967 and 1970, Western Electric Company received three contract awards of the cost-plus-fixed-fee type. All subsequent contracts between 1971 and 1979 were awarded to appellant (R4, tabs 68-70). A summary of the procurement history follows:

Year	Contract	Type*	Qty	Unit Price	Contractor (sub)
1964	DA01-021-AMC-11747(Z)	AFP	47	$ 517.33	McQuiston (Jennings Radio)
1965	DA01-021-AMC-13220(Z)	NFP	154	411.30	McQuiston (ITT Jennings)
1966	DA01-021-AMC-15295(Z)	NFP	80	443.00	McQuiston
1966	DAAH01-67-C-0808	NFP	295	417.00	McQuiston
1967	DAAH01-67-A-0024	CPFF	216	681.00	Western Electric
1968	DAAH01-67-A-0024	CPFF	171	682.00	Western Electric
1969					
1970	DAAG25-71-C-0230	CPFF	39	1456.07	Western Electric
1971	DSA900-72-C-2372	AFP	48	697.34	McQuiston (ITT Jennings)
1972	DSA900-72-C-7536	AFP	20	897.66	McQuiston (ITT Jennings)
1972	DSA900-73-C-5014	NFP	122	734.00	McQuiston
1973	DSA900-74-C-1816	NFP	74	682.00	McQuiston (ITT Jennings)
1973	DSA900-74-C-3273	AFP	300	638.00	McQuiston (ITT Jennings)
1974	DAAH01-75-C-0073	NFP	109	739.70	McQuiston (Kilovac)
1975					
1976					
1977					
1978	DAAH01-79-C-0179	AFP	216	780.50	McQuiston (Kilovac)
1979	DAAH01-79-C-0621	AFP	65	946.20	McQuiston (Kilovac)
1980	DAAH01-78-G-0018	CPFF	211	2200.00	Western Electric

*Type of contract is abbreviated as follows:
AFP — advertised fixed price
NFP — negotiated fixed price
CPFF — cost-plus-fixed-fee

The Vacuum Relay

3. Each pulse network utilized two vacuum relays, each of which are required to carry 8,000 volts of direct current. The mechanical parts of the relay are enclosed in a glass vacuum tube similar to a radio-type vacuum tube. These relays, as noted below, presented considerable difficulties to appellant over the range of its involvement in the aforementioned procurements. (R4, tab 340) At the hearing, appellant prepared a diagram of the relay

BEST AVAILABLE COPY

operating part substantially identical to what appears below (exh. A-1):

(FIGURE DELETED)

4. Contract Drawing No. 9755026 depicts the specification for the vacuum relay component originally designed and manufactured by Jennings Radio Manufacturing Corporation in 1964 (R4, tabs 63, 340). In 1967, the drawing was revised after Jennings was acquired by International Telephone and Telegraph Corporation (ITT) and became a division known as ITT Jennings. There have been no changes to the drawing since that time. (*Ibid.*) Drawing No. 9755026 contained the following notes:

> 1.1 SOURCE OF SUPPLY JENNINGS RADIO MANUFACTURING CORP.
>
> * * *
>
> JENNINGS RADIO PART NO. RBID-26N202
>
> * * *
>
> 1.1.1 SOURCE INFORMATION IS FOR THE CONVENIENCE OF THE PROCURING ACTIVITY. IT IS NOT TO BE CONSTRUED AS RESTRICTING QUALIFIED SOURCES OF PROCUREMENT.
>
> 2. REQUIREMENTS:
>
> 2.1 THIS ITEM IS THE SAME AS MANUFACTURER'S PART NUMBER RB1D-26N202 EXCEPT AS STATED IN REQUIREMENTS 4 AND 5.

2.2 THE RELAY SHALL BE IN ACCORDANCE WITH THE APPLICABLE REQUIREMENTS OF 9006876 . . .

* * *

3. THE RELAY SHALL MEET THE FOLLOWING REQUIREMENTS:

* * *

3.1.3.1 OPERATE: 68 MA

3.1.3.2 HOLD: 30 MA

3.1.3.3 RELEASE: 6 MA

3.1.4 TESTING CURRENT (SEE 9006876. PAR. 2.1): 110 MA

3.2 AMBIENT TEMPERATURE RANGE:

3.2.1 −40°C TO 85°

3.3 CONTACT DATA:

3.3.1 MATERIAL: TUNGSTEN ÂND MOLYBDENUM

3.3.2 RATING: 10 AMP RMS, 15 KV PEAK, 60 CPS

3.3.3 A 10,000 VOLT AC RMS 60 CPS DIEELCTRIC STRENGTH TEST SHALL BE APPLIED BETWEEN CONTACTS.

3.4 STABILITY

* * *

3.4.2.1 OPERATE CURRENT: +10%

3.4.2.2 HOLD CURRENT: +20%

3.4.2.3 RELEASE CURRENT: −20%

* * *

4. FINISH

* * *

5. MOUNTING HOLES SHALL BE OMITTED FROM THE FLANGE.

(R4, tab 63)

5. Appellant first experienced difficulty obtaining relays from its vendor under its initial contract in 1964, Contract No. DAO1-021-AMC-11747(Z) (tr. 1618 *et seq.*). Attempting to procure the relay from Jennings Radio Manufacturing Corporation pursuant to Drawing No. 9755026, appellant was informed by Jennings that Western Electric, to whom Jennings was also supplying relays, was not procuring to that drawing. Jennings had advised appellant that it would not furnish the relay listed on Drawing No. 9755026, *i.e.*, Jennings Radio Part No. RB1D-26N202 (R4, tab 100; exh. A-2; tr. 1640). In this regard, Jennings had earlier quoted the following to Western Electric:

> We can comply with this specification as shown on your drawing, however, in order for the Jennings vacuum relay to be in complete compliance with your specification, the part number as referred in paragraph 2.1 should read RB1K-26N368 and this paragraph should read "this item is the same as manufacturers part number RB1K-26N368 as stated in requirements four and five." Under electrical data paragraph 3.1.3.2 should read "hold current 38 MA" instead of 30 MA, and paragraph 3.1.3.3 release current should read "3.5 MA" instead of 6 MA. These changes are requested in order to eliminate any possible rejection.
>
> Our quotation is based on your engineering department accepting the changes requested. These changes in no way alter the part as specified.

(R4, tab 98)

6. Accordingly, with respect to appellant, Jennings not only was incapable of meeting the requirements it addressed in its aforequoted letter to Western Electric, but in addition, was not able to guarantee appellant the 68 milliamp "operate" required by paragraph 3.1.3.1 of Drawing No. 9755026 (tr. 1641; exh. A-2). Jennings asked for a waiver to increase that rating to 73 milliamps (tr. 1642).

7. While Jennings advised appellant that it had been able to obtain deviations with respect to its Western Electric contract, appellant would not permit any deviations without first obtaining Army approval (*ibid.;* tr. 1640-42). Respondent first advised appellant that it was too costly to make drawing changes, especially since the pulse forming network was an old system about to be retired (tr. 1619); however, appellant eventually obtained the waivers which Jennings required under Contract No. -11747 (tr. 1648, 1658). We note that up until the time of the waiver, appellant obtained relays from Jennings which indeed complied with the specifications (tr. 1647-48). This was possible because the characteristics of the relays were such that in producing such large quantities for both appellant and Western Electric, a certain percentage of the relays in a production run would fall within specification requirements. Since is was producing to a waiver for Western Electric, Jennings could accommodate appellant with specification compliant relays as long as it continued to manufacture relays for both Western Electric and appellant under these circumstances (tr. 1647-1648). Contract No. -11747 was extended to cover the delays attributed to appellant's and respondent's attempts to resolve the waiver issue regarding Drawing No. 9755026 (tr. 1619, 1646-47, 1658).

8. Contract Nos. DAO1-021-AMC-13220(Z) AND DAAHO1-67-C-0808, subsequently awarded to appellant during 1965-1966, do not appear from the record to have been particularly troublesome to appellant, although Jennings continued to furnish the relays for these contracts (R4, tabs 68-70). In 1967, ITT acquired Jennings which became known as ITT Jennings. (R4, tabs 68-70, 340; tr. 1236, 1419) In 1967 and 1970, Western Electric received award of Contract Nos. DAAHO1-67-A-0024 and DAAG25-71-C-0230, respectively (*ibid.*). While the record is silent as to what occurred under these contracts, it is reasonable to conclude that Jennings continued to deliver relays to Western Electric pursuant to the aforedescribed waivers.

9. Following the ITT takeover of Jennings Radio in 1967, the relay underwent configuration changes and the failure rate of the relays increased to a problem level (R4, tab 340). Appellant encountered problems with the newly configured relay during performance of Contract No. -2372, in particular, broken relays, air entrapment under sealed surfaces and voltage breakdown (R4, tabs 32, 68, 115, 117, 340; tr. 1621). Appellant was granted a time extension of Contract -2372 for consideration of one dollar per unit; presumably, the reasons for the delay were these problems (tr. 1621). Regarding such problems, on 18 July 1972, appellant communicated the following to respondent:

* * *

> A sole-source item, 9755026 relay, procured from ITT Jennings Radio, is delaying the contract completion. ITT is having difficulty, suddenly, making acceptable parts. These items are metal-and-glass vacuum units and their construction is an art and is difficult, and they are very expensive. We have procured them for this item off and on for eight years

from this vendor and we can say in the main the units are good and long-lived. Lately, trouble has been encountered when the relays are assembled and given over-voltage tests. Several units have broken down, apparently due to a faulty sealing of the glass.

* * *

The manufacturer has required, and is requiring, some time to adjust his quality checks to screen potential defectives. Since there is a long wait after "clean up" until one can retest with accuracy, that waiting time, inexorably, must be permitted. However, we are, of course, pressing him to repair his processing so that the testing is not so critical to good production. Prior units have not exhibited the breakdown difficulty.

(R4, tab 118)

10. As already noted, appellant received three follow-on contracts during the 1972-1973 period; the record is silent as to whether appellant encountered any unusual problems with the relays during the performance of these contracts. During the 1973-74 period, appellant received award of Contract Nos. DSA900-74-C-3273 and DAAH01-75-C-0073 for the supply, respectively, of 300 and 109 pulse forming networks. While a large number of the relays for these networks were delivered without serious difficulties, the final delivery of Contract -3273 had to be extended, placing appellant more than a year behind the original schedule (tr. 1623; R4, tabs 68-70). Appellant's president testified to experiencing a "stupendous crisis" which led to the grant of the extension. In this regard, on 12 August 1974, appellant communicated the following to its relay vendor, ITT Jennings:

* * *

There seems to be a breakdown in your quality assurance inasmuch as the observations in your letter did nothing but point out that you are not performing the proper testing or inspection to insure quality of product.

It is not possible to separate good and bad units merely by applying the hipot breakdown test as you apparently did. You will note that 9755026, to which these units must be built, requires standards of workmanship, shock, vibration, temperature, etc, to be met as well.

A brief check of our inspection records, which were enclosed with the returns, revealed about 40 units which were rejected for causes other than hipotting. The fact that you could not find fault with those units is unsettling to us inasmuch as the units were unmistakably identified with other reasons for rejection and there could be no mistaking the fact that the requirements of 9755026 were not met.

With respect to the units with glass damage, the damage is the direct result of the mechanical defects that were built into the units. If you delivered units with these defects then you must accept responsibility when they fail.

We are convinced by our research that if, of the units in the 40 under the discussion that were rejected for inherent scratches and incomplete sealing, those units had been mounted and potted, at least 15 more would have had glass damage. This failure mode has been proven here to our satisfaction. Defects of this type are caught by visually inspecting the unit for glass scratches (none permitted), incomplete melting and joining at the seals and joints, and glass depressions causing stress raisers (non-cylindrical

> glass). Units with these defects are considered to fail 2.2 or 3.4 of 9755026, including 1.1 of 9006876 . . . .
>
> Inasmuch as your quality-assurance is deficient, it will not be possible to accept at your plant until quality is back to its former excellence. Inspection and acceptance will continue to be at our plant.
>
> We will endeavor to work with your engineering, production, and quality assurance personnel in order to help you as much as possible. But we want you to understand that your problem is not merely one of testing alone, but that positive cures must attack the manufacturing defects first. However, we believe it would not take much concentrated effort to effect a cure.

(R4, tab 131)

11. Appellant also advised respondent of the status of Contract No. -3273 regarding the relays on 12 August 1974:

> The delivery of the 88 balance of Reference contract will be delayed due to a production and quality problem concerning the supplier of a critical component.
>
> The supplier, ITT Jennings, has submitted the enclosed letter in response to our letter also enclosed. You will note that their quality assurance group has failed to inspect properly their defective production.
>
> If there were no manufacturing defects, then the failure to inspect properly would not be as serious. However, these units are blown glass, made by artisans, and the manufacture is an art, not a science, at ITT. The art is evidently elusive at this time.

(R4, tab 35)

12. On 30 September 1974 appellant again advised respondent of the status of its problems with its relay vendor under Contract -3273 indicating that ITT Jennings had not been able to deliver the balance of the relays pursuant to Drawing No. 9755026 and therefore would not be able to complete the contract (R4, tab 37). Appellant further advised respondent that while it had previously requested respondent's assistance in procuring the relays, to date it had been unsuccessful in obtaining such assistance. In addition, appellant, for the first time advised respondent of a defect in Drawing 9755026:

> There seems to be a defect in the drawing and that defect has prohibited us or you from exerting enough pressure on the subcontractor to obtain delivery as scheduled. Because of the advertised procurement, there were limits on the amount of premium we could offer in our bid, contrasted with others ignorant of the drawing defects, in order to shore up the defects on an independent basis.
>
> As you know, your engineer is aware of these defects and their effect on the procurement of this part both for this contract and for independent Government spares contracts direct to the subcontractor.

(R4, tab 36)

13. As a result of appellant's contentions, the Administrative contracting Officer (ACO) requested technical assistance from the respondent's Production Engineering Branch. On 7 October 1974, the Production Engineering Branch sent the following response to the ACO. We quote from the memorandum in full since it evidences the respondent's contemporaneous view of the relay problems then facing appellant:

> 1. *General.* This is in response to your request for technical assistance on the above contract. This

office has visited the contractor's facilities to review the problem. Contact was made with James McQuiston, Owner.

2. *Problem Areas.* There were no problems encountered so far as the contractor was concerned. All data and information requested was provided willingly.

3. *Discussion.*

a. The item under contract is a network pulse form device for use on a radar system. There are two relays used in each system. These relays are required to handle 8000 volts of direct current. The contacts in the relay are enclosed in a glass vacuum tube similar to radio type vacuum tubes. The contractor has been fabricating this hardware since 1964 and no serious manufacturing problems have been encountered until now. The relay was originally designed and manufactured by the Jennings Manufacturing Company and Jennings was recently acquired by ITT under the name of ITT Jennings. Since ITT took over, the product has undergone configuration changes and the failure rate has increased to a problem level.

b. Ordnance Corp's Drawing Number 9755026 delineates this relay. The drawing is strictly an envelope type drawing with minimal performance requirements specified. The relay is more specifically identified as Jennings Radio Part Number RB1D-26N202. Under normal circumstances a vendor part number is sufficient for procurement with the expectation that repeatability will occur. Unfortunately a vendor part number and its configuration is proprietary with the vendor and he has the prerogative to change it as he sees fit without coordination with his customers. There are

indications that changes have occurred in this instance. The contractor claims that the reject rate has gone from an acceptable 5% to 30% or more.

c. A review of the available vendor specification discloses vagueness and looseness which tend to support the contractor's explanation of what he thinks may be causing the relay failures. The most common failure experienced by the contractor is the observation of a glow (fluorescence) under 18,000 VDC test. The vendor specifications 857-2, sheet 1 of 1, indicates in the unit screening and acceptance criteria that no fluorescence is allowed. If the vendor is meeting this requirement and the reject criteria develops after installation and upon system test, it appears that the vendor test is not adequate to assure performance in the system application.

d. The fluorescence appears to be caused by impurities or stray material that are not removed when the vacuum is drawn on the tube before sealing. It is possibly [sic] to energize the contacts in the assembled relay in such a manner as to cause this stray material to vaporize and condense on the side walls of the vacuum tube. Thus a vendor test might not disclose the fluorescence. During subsequent soldering operations, the glass wall of the vacuum tube become [sic] heated and can cause evaporation of the stray material with a redeposit of the material on the sapphire rod of the relay. The same test after soldering would show fluorescence if the stray material did exist and was deposited on the sapphire rod.

e. The prevention of this problem can be approached in several ways so far as production is

concerned. Better control of cleaning and decontamination before drawing the vacuum is one alternative. The use of a "getter" in the vacuum is another alternative. These techniques have not been specified nor should they be imposed. The vendor's process should be left to his discretion. There are however quality control tests that could be imposed to force a vendor to produce a relay that would not display fluorescence after installation.

f. The existing contract with the applicable specifications cannot control this problem. It is recommended that the government, contractor, and vendor get together to resolve this problem on the current contract and the anticipated follow-on contract. Such a meeting would serve the best interests of all parties. If, during this meeting, additional quality assurance procedures are determined to be necessary, equitable adjustments should be made. The only alternative, without having such a meeting, will result in a continuation of the problem (i.e., high vendor rejections and schedule delays). The contractor will be obligated to fight the problem with the vendor with subsequent delinquency. Modifications will be required to extend schedules and other administrative problems will occur.

g. In order to correct this problem permanently an update or revision to the specification should be considered. The contractor has already initiated with his own funds a specification from which he feels he can control the vendor product. The contractor also has been investigating an alternate vendor as a possible source of relay supply. This source is Kilovac Corporation of Santa Barbara.

Kilovac uses a "getter" in their product. McQuiston indicated that he was reluctant to risk antagonizing his only source of supply (ITT Jennings) without first proving that the Kilovac product was equal to or superior to the Jennings product. McQuiston indicates a long term solution is [to] revise the specification and develop an alternate source. This reviewer suggests that the PCO consider McQuiston's long term solution and discuss the possibilities of submitting a proposal to produce a refined specification for the vacuum relays, and to supply a small quantity of the network pulse form systems with the alternate source to be evaluated by the government. This recommendation should run concurrently with the existing contracts or follow-on contracts in order to avoid schedule delays.

4. *Conclusion.* This office cannot resolve the problems that have been induced by the acquisition of Jennings by ITT and the subsequent management, processing and/or hardware changes. ITT Jennings is located in San Fancisco and has been under surveillance of DCASR-SF DCRC-POS/D5. DCRL-DLPE has not obtained direct vendor input to this problem and has not reviewed and/or discussed the problem with ITT Jennings. Although this is a small dollar value contract, it would behoove all parties (McQuiston, Jennings, and Buying Agency) to jointly discuss increased rejection rate at the vendor level and attempt to introduce the needed control to resolve the problem. A long term approach would require a knowledge of the future needs for the item and possibly develop an alternate source.

(R4, tab 340)

14. After considering the aforequoted views of respondent's Production Engineering Branch, the contracting officer sent the following telegram to appellant on 27 November 1974:

> IT HAS BEEN DETERMINED THAT NO CONFIGURATION CHANGES HAVE BEEN MADE IN APN9755026, ARMATURE RELAY AND NO ERRORS EXIST ON THE DRAWING. THE PROBLEM WOULD APPEAR TO BE ONE OF WORKMANSHIP AND QUALITY CONTROL ON THE PART OF THE VENDOR. YOU ARE CURRENTLY DELINQUENT REGARDING DELIVERY OF 62 EACH OF THIS RELAY ON CONTRACT DSA900 74 C 3273. WITHOUT PREJUDICE TO THE RIGHTS OF THE GOVERNMENT WITH RESPECT TO SUCH DELINQUENCY, PLEASE ADVISE THAT IF YOU WILL ACCEPT A NO-COST CANCELLATION OF THE ABOVE UNDELIVERED BALANCE OF 62 EACH. REQUEST REPLY WITHIN 48 HOURS.

(R4, tab 133)

15. On 2 December 1974, appellant responded to the aforequoted telegram as follows:

> At this time, 254 units have been completed, and the balance of 46 is so nearly complete that a cutback to the lowest possible quantity (254) would result in total adjusted contract price larger than the price now in force.
>
> Moreover, the substantial escalation of the component costs would mean that for this attrition item the replacement of the cutback units would be excessively costly. It would not be economically feasible to give up these low-cost units.

* * *

> With respect to your alleged determination that no errors exist on drawing 9755026, we are somewhat surprised by your seeming acceptance of implied warranty for parts defective in design, and an opposite stance from your local engineer on the determination. You should know after your investigation that parts built to the acceptance level of this drawing will not be operable in the end-item, due to inadequate design control. That fact is unassailable.
>
> The extent and correction of errors on 9755026 are proprietary data and you are not to disclose them to others. We have incurred considerable expense engineering a solution to the problem. That corrective action now threatens to invalidate any future competitive procurements for this item that the Government may undertake.

(R4, tab 37)

16. On 2 January 1975, respondent notified appellant that it was in agreement that no units should be cancelled under Contract No. -3273 and requested appellant to furnish a new firm delivery date for the balance due so that the contract could be modified to reflect the new date. Respondent further advised appellant that with respect to the drawings relating to the relay, the cognizant service engineering activity had determined the drawings to be correct and that respondent had no obligation or responsibility to assist appellant with its subcontract problems (R4, tab 134).

17. On 10 March 1975 appellant advised respondent as follows:

> At this time, there remain 32 networks to be delivered. We will deliver 17 on March 14. These 17 required 34 relays from ITT, part of 41 relays promised (Feb 24) by Mar 1 from a lot promised to have

been delivered last December. Only 38 of the 41 were shipped, and only by Mar 6; some of those were defective and must be rejected. Thus only the 17 could be assembled. For ITT Jennings to replace these rejects may take 60 days or more, given past performance as a guide.

We will continue to exert all possible pressure on ITT to deliver the balance quickly. Perhaps it will be only a matter of weeks until they deliver enough good parts to complete the contract. However, we propose that you revise the scheduled delivery to June 16, 1975 for the balance. There is also the possibility that the June 16 date will not be enough time, given ITT Jennings' recent record.

At this time we are developing a proprietary specification in order to procure reliable relays from another source. If the other source can be developed, we intend to complete this procurement using relays from whichever source delivers earliest. However, it may be that another source cannot be found.

(R4, tab 136)

18. On 13 May 1975 appellant received a no cost time extension for the undelivered balance of the pulse forming networks due under Contract No. -3273 (R4, tab 143). Appellant's Contract -0073, while not yet delinquent, was suspected of ultimately being so. In this regard, appellant informed respondent:

The presently unprocurable item, a relay, OPN 9755026, two of which are assembled in each end-item, is a sole-source item with which the long-time producer, Jennings Radio (now ITT Jennings), has lately and suddenly experienced a considerable (and inexplicable) rejection rate. It is a high-value item. Jennings is now a year behind schedule on a prior

> contract with us for the same item (DESC DSA900-74-C-3273) and, apparently, tentatively has decided not to accept new requirements to this specification, at least not until the prior contract is complete and its results analyzed.
>
> An alternate source was cultivated by our engineering staff and a specification submitted for quotation. That source answered ". . . . None of us could remember ever having seen such a comprehensive specification to cover one of our relays . . . . We are not in a position to make the required changes in design, manufacturing and testing to be able to quote exactly to your specification." The differences between specification and any available substitute appear to be substantial and may compromise reliability. We are continuing to evaluate the reliability aspects.

(R4, tab 40)

19. In February 1979 appellant asked Kilovac, the other source appellant had been attempting to develop to supply vacuum relays under Contract No. -0073, to furnish a quote (R4, tab 135); ITT Jennings was continuing to experience quality control and delivery problems (R4, tab 136). In early March 1979 Kilovac responded that it was not in a position to quote exactly to appellant's relay specification. Kilovac excepted to certain requirements thereof, relating to the spot heating of the glass envelope, certain inspection testing, delivery definitions, limitation of liability with respect to testing, materials to be furnished thereunder, and excessive insulation test voltage. As a second alternative, Kilovac suggested that appellant simply purchase its own standard parts which could be tested in accordance with standard MILSPEC requirements (R4, tab 137).

20. In late March 1975, ITT Jennings informed appellant that the relays it had been furnishing under Contract

No. -3273 had met the requirements of the technical specifications therein defined and that during the course of that contract appellant had rejected these relays. ITT Jennings also indicated that the relays had been replaced and repaired at no charge (R4, tab 138). ITT Jennings advised appellant that it would not be able to furnish additional quotations for the relays pursuant to Contract No. -0073 until it received and approved a definitive specification. Appellant responded as follows:

> With respect to your comment about the belief you hold concerning the technical suitability of relays delivered on contract DSA900-74-C-3273, please be advised that our technical requirements for this product have not changed for over ten years of procurement from you. Only lately have there been substantial problems with the level of excellence in your products. At no time have any relays been rejected by us that did meet the technical requirements. We submit that if you believe otherwise, then perhaps the testing at Jennings has not been adequate to catch intermittent failures, and while we do not like that, we should like to point out that inspectors can only *discover* defects — they do not *create* them. Nor do they discover all defects all the time.
>
> Our rejects can be classed into seven groupings:
>
> 1. Solder tabs not welded to the terminals, making it impossible to connect wiring to the unit.
>
> 2. Unit glowed or flashed over on hipot, or was shorted internally.
>
> 3. Glass contained stresses according to polariscope testing, or contained scratches, that might cause failure when subjected to specification shocks.
>
> 4. Seal was not properly wetted and might cause vacuum failure.

5. Mechanical action was physically impaired.

6. Coil was open-circuited.

7. Coil mounting stud was damaged, with usual cause over-torquing the mounting nut on assembly (missing lockwashers were not a cause for rejection).

(R4, tab 139)

21. On 9 May 1975 Kilovac acknowledged appellant's purchase order for 225 vacuum relays (R4, tab 140). Kilovac's immediate acceptance of appellant's purchase order was based upon appellant's so-called proprietary specification drawing with several qualifications which did not give appellant much concern (exh. A-1; R4, tab 141). A comparison of appellant's proprietary specification drawing indicates that appellant was significantly concerned that the requirements for calibration of the measurement and testing equipment be comprehensively detailed and that the procedures of measurement take into account the known errors of calibration for testing to minimum and maximum ratings. Appellant further desired to more precisely specify to its vendor the inspection requirements to be applied to the relay. Insofar as the pertinent operating requirements of the relays were concerned, some of the comparisions are tabulated below:

INSPECTION VALUES AFTER 1 SECOND SOAK AT 28 VOLTS:	Appellant's Specification Control Drawing	Drawing 9755026
OPERATE	68 MA	68 MA
HOLD	30 MA	30 MA
RELEASE	6 MA	6 MA
STABILITY		
OPERATE CURRENT	± 10 percent	+ 10 percent
HOLD CURRENT	± 20 percent	+ 20 percent
RELEASE CURRENT	± 20 percent	- 20 percent

CONTACT RESISTANCE AND RATING		
RATING	10 amp RMS, 10 KV RMS, 60 cps	10 amp RMS, 15 KV peak, 60 cps

(Exh, A-2)

22. In addition, appellant's specification required the relay to be subjected to repeated testing at the high voltage potential (hipot) of 18.0 KV DC minimum applied both between COM and NO terminals and between COM and flange as two separate tests, the potential being applied for a "minimum 60 . . . [seconds] for each test, without any glow becoming visible . . . , and without flashover . . . " In order to resolve the seal leakage problem, appellant specified in more detail the construction requirements of the relay (*ibid.*)

23. On 13 May 1975, ITT Jennings confirmed its decision not to quote on appellant's request with regard to relays (R4, tab 142) and appellant's delivery date on Contract No. -3273 was extended to 16 June 1975 at no cost to appellant or the respondent (R4, tab 143). On 20 June 1975, regarding the Contract No. -3273 situation, appellant advised respondent as follows:

> This component is not now being marketed by the producer listed on the drawing, ITT Jennings Radio, due to quality-control problems. However, Jennings has asked not to be removed from the drawing.
>
> Another source [Kilovac] has been persuaded, after lengthy negotiating, to manufacture this item. However, it was decided that the drawing as it stands is inadequate to control the product. Therefore, we are now controlling it with a proprietary specification based on our long experience with this unit, and under our engineering control, which embodies the

requirements of 9755026 plus several more requirements that are considered essential to the assurance of component quality.

This development has been accompanied by a substantial increase in the price of the component. We are not at this time planning to ask the Government to reimburse us for this extra cost on this contract. However, for future procurement, it appears that the end-item cost will be substantially higher for both of us. That higher cost will be mitigated somewhat by the companion increase in reliability and procurability.

(R4, tab 42)

24. On 19 August 1975, appellant received an extension in the delivery date under Contract No. -0073. Modification No. P00001 thereto, "[d]ue to delivery problems beyond the Contractor's control . . . ," revised the delivery date under Contract No. -0073 to read 12 September 1975 (R4, tab 43). According to appellant's president's testimony, Kilovac's initial deliveries were not acceptable (tr. 1624). It was appellant's president's belief, however, that the delays Kilovac experienced under Contract No. -0073 were essentially inconsequential and accordingly appellant perceived their problems to be behind them at the successful conclusion of Contract No. -0073 (tr. 1626). The record does not indicate that Kilovac experienced any difficulty with the high voltage potential test of 18 KVDC minimum (tr. 1667-68).

25. Upon the completion of Contract No. -0073 in September 1975, respondent made no further procurements of the pulse forming network during the 1975-1977 period (R4, tabs 68-70).

The Instant Procurement

26. On 29 September 1978, respondent issued Solicitation No. DAAH01-78-B-0883 for the supply of 216 pulse forming networks to be delivered within 300 days of contract award. While a bidder who had to submit a first article would have had 420 days for production, the inclusion of the 300 day period for bidders for whom the first article was waived was not a mistake but a deliberately established period (R4, tabs 1, 44). At this time respondent was considering whether or not to grant appellant a waiver of the first article requirement because it had already delivered approved first articles under Contracts -0073 and -2372 (R4, tab 44). Contract DAAH01-79-C-0179 was awarded to appellant on 20 December 1978. The first article submission was waived and appellant was required to deliver the 216 pulse forming networks at a unit price of $780.50 within 300 days i.e., 16 October 1979 (R4, tab 1). Despite its prior problems, in 3 November 1978 Kilovac quoted $88.75 per relay for the vacuum relays under the instant contract, as compared with its previous quote of $75.25 under Contract No. -0073. Kilovac stated: "Relays to be the same as supplied on your Order #DAA-H01-75-C-0073, dated 9 May 75" (R4, tabs 3-5). The record does not indicate that either appellant or Kilovac anticipated unusual performance difficulties prior to entering the instant contract, since their respective problems had already been worked out (tr. 1625-26). Thus, appellant did not anticipate respondent's assistance insofar as it expected Kilovac to meet the scheduled deliveries with "little or no problem whatsoever" (tr. 1626). Indeed, Kilovac subsequently accepted appellant's order for 442 relays expecting to deliver them within slightly more than three months, and no later than 17 June 1979 (R4, tab 4).

27. On 27 March 1979, appellant was awarded Contract No. DAAH01-79-C-0621 for 65 pulse forming networks at a unit price of $946.20 (R4, tab 65). In response to this new requirement, appellant, in an effort to avail itself of the prices for the 442 relays Kilovac had agreed to under Contract -0179, attempted to increase its order from Kilovac by 136 relays. The parties disagree as to whether this was actually accomplished (R4, tabs 6-10). Kilovac later, on 24 August 1979, denied having received appellant's order for these additional relays (R4, tab 8). Delivery of the 65 networks was required by 21 April 1980, a delivery period of approximately 390 days. Appellant completed delivery under Contract -0621 on 15 June 1979, utilizing relays it had ordered for Contract -0179 (R4, tab 66 tr. 1306-1309). No deliveries had yet commenced under Contract -0179 (R4, tab 55).

28. Between 29 June 1979 and 17 August 1979, appellant delivered 112 networks under Contract -0179, leaving a balance due of 104 units (R4, tab 55). The scheduled and actual deliveries for Contracts -0621 and -0179 are tabulated below:

DELIVERIES UNDER CONTRACT — 0621 for 65 Units

Actual Delivery	No. of Units	Required
25 May 1979	16	
15 June 1979	49	
	65	21 April 1980

(R4, tabs 65, 66)

DELIVERIES UNDER CONTRACT —
0179 for 216 Units

Actual Delivery	No. of Units	Required
29 June 1979	24	
6 July 1979	16	
13 July 1979	24	
3 August 1979	19	
10 August 1979	17	
17 August 1979	12	
	112 Units	
Undelivered Balance	104	16 October 1979

(R4, tab 55)

Priority Assistance

29. Contract -0179 incorporated by reference the clause entitled "Priorities, Allocations, and Allotments (1975 OCT)", ASPR 7-104.18 (R4, tab 1 at 21 of the contract). We quote therefrom in pertinent part:

> The Contractor shall follow the provisions of DMS Reg. 1 or DPS Reg. 1 and all other applicable regulations and orders of the Bureau of Domestic Commerce in obtaining controlled materials and other products and materials needed to fill this order.

Contract -0179 was assigned a priority rating of DO-A2* (R4, tab 1).

---

*The DO rating is one of two types of authorized ratings, the other being a DX rating. Ratings must contain the prefix DO or DX, as the case may be, followed by the appropriate program identification, in this case A2 for missiles program. All DO rated orders have equal preferential status, and take precedence over unrated orders previously or subsequently received. All DX rated orders have equal preferential status, and take precedence over DO rated orders and unrated orders previously or subsequently received (32 C.F.R. §§ 651.4(a), (c), and Schedule 1).

30. Under the applicable Defense Priorities System Regulation 1 (DPS Reg. 1), as revised 15 Jun 1974 (32A. C.F.R. § 651), appellant was authorized to place DO rated orders for his requirements for products and materials under the contract (32A C.F.R. (§ 651.3(c) and (d)). DPS Reg. 1 provided for requests for assistance under the priority system as follows (32a C.F.R. (§ 651.12):

Sec. 12. Expediting assistance and assistance in placing mandatory acceptance orders.

(a) If a person has placed a mandatory acceptance order and needs expediting assistance to obtain timely delivery, he shall request expediting assistance from the appropriate Defense Agency specified in Schedule 1 of this regulation. Such request shall be submitted on form DIB-999 (Formerly BDSAF-138) which may be obtained from U.S. Department of Commerce District Offices or from the Bureau of Domestic Commerce, U.S. Department of Commerce, Washington, D.C. 20230.

(b) If a person cannot find a supplier who will accept a mandatory acceptance order he attempts to place, he shall request assistance in placing such order from the appropriate Defense Agency specified in Schedule 1 of this regulation. Such request shall be submitted on Form DIB-999 (Formerly BDSAF-138) which may be obtained from U.S. Department of Commerce District Offices or from the Bureau of Domestic Commerce, U.S. Department of Commerce, Washington, D.C. 20230.

(c) Requests for assistance made in accordance with paragraph (a) or paragraph (b) of this section must establish that:

(1) There is an urgent defense related need for the products, materials or services, covered by the associated mandatory acceptance order.

(2) Applicant has exercised reasonable effort to resolve the problem through employment of his own resources, and

(3) The request for assistance is timely.

Form DIB-999 was replaced by Form ITA-999 under the instant contract (R4, tabs 20,255).

31. Appellant's president employed the Defense Priority System in 1955, when in connection with a contract associated with the Atlas Missile Program, he filed a Form BDASF-138, Request for Special Priorities Assistance, and obtained timely delivery of the needed parts. Again, in 1958, appellant's president filed a Form BDASF-138 in order to expedite shipment under another contract (tr. 1283-1285, 1434, 1435). He had also used the system previously, with regard to the same relays and networks involved in the instant contract, on contract -0808 in 1967 (tr. 1286, 1287, 1436). In that instance, however, after the Form BDASF-138 was filed, the Government suspended action on the request since it was determined that the subcontractor, ITT Jennings, had taken action to assure that the delivery schedule would be met (tr. 1287; R4, tabs 107-110).

32. During the pre-award survey on the instant contract, Mr. Gary Higgs, who was responsible for priority assistance for respondent, briefed appellant on the operation of the system. Appellant was told that a new Form ITA-999 had replaced the Form BDSAF-138, but that procedures remained essentially the same as when appellant had experienced them before (tr. 1290, 1450). Thus, we find that appellant's president was familiar with the

operation of the Defense Priorites System as modified at the time of the instant contract.

33. It first became apparent to appellant that deliveries under the instant contract might reqire priority assistance when it received a 24 August 1979 letter from Kilovac declining appellant's request to augment its subcontract to furnish 136 additional relays, and indicating its intention to return 62 relays previously rejected by appellant and needed for contract 0179 (R4, tabs 8, 205; tr. 1298, 1452). Concerned that there might be a problem meeting the contract's delivery schedule, appellant, on 17 August 1979, sent a letter to ITT Jennings requesting their re-entry into the relay market (tr. 1300, 1383, 1393; R4, tab 209). In addition, appellant's president notified Kilovac's marketing vice-president that the respondent could require production of rated orders (tr. 1298, 1299, 1386). Troubled by Kilovac's opinion that production could not be required except in time of war, appellant asked the Defense Contract Administration Services Region (DCSAR) office to send Kilovac a copy of the Defense Priorities System Bulletin (tr. 1302, 1391; R4, tabs 206, 208).

34. On 13 September 1979, appellant met with DCASR representatives to review the Kilovac quality problems. One of the DCASR representatives requested that appellant obtain three other sources to bid on the relays to facilitate the processing of a form 999 to initiate priority assistance action. The three other sources were required because DCASR no longer processed requests involving sole sources; however, the DCASR representative stated that he would talk to Kilovac, and see if just "jawboning" would help the situation (tr. 1388-1391; R4, tab 215). Appellant, in late September -early October 1979, continued attempts to re-establish Jennings as a source. Indeed, Jennings had promised to deliver a first

article to appellant in mid-October 1979, and if it was deemed acceptable, appellant intended to order the balance of the Kilovac relays from Jennings (tr. 1026-28; R4, tab 227).

35. On 26 November 1979, Kilovac informed appellant that it would not perform further work under its subcontract (R4, tabs 18, 249). Approximately one week later, appellant reinstated its efforts to obtain priority assistance (tr. 1404). In this regard, appellant filed two "Request for Special Priorities Assistance" (Form ITA-999) forms under contract -0179, one for 89 relays on 4 December 1979 (R4, tab 255), and the other for 136 relays on 5 December 1979 (R4, tab 20). A DCASR representative had earlier requested that the two orders be separated instead of having them both on the same form to accommodate the dispute as to the extent of Kilovac's obligation under the instant contract (tr. 1030, 1031, 1404; R4, tab 23 at 2). At a meeting at DCASR, respondent informed appellant that it did not have a purchase order for the 136 relays, and that its request for priorities assistance could not be processed without a firm purchase acknowledgement from Kilovac. It was finally agreed to process both forms, and appellant was given the name and telephone number of an individual employed by the Department of Commerce to contact for assistance (tr. 1405, 1406).

Alleged Interference with the Subcontractor Relationship

36. In late July 1979, Kilovac was concerned about the return of 69 relays appellant had rejected. An internal memorandum indicated:

The returns are divided into the following broad classifications:

A.	Flashover	19 Relays
B.	Glass flaws	18 Relays
C.	Variable, or out of specification operating voltages	32 Relays

***

All of these criteria are purely subjective and allow us to be entirely at McQuisiton's mercy. With such a contract we can only proceed on our own judgment as to whether the purchaser is a reasonable man.

***

In summary I find that much of my experience with McQuiston has been valuable. He is quick and intelligent but also has the self-centered ego of his type. He will defend the indefensible to the last ditch.

Unless he is prepared to make compromises with his specification, I believe any of his orders will result [sic] in economic loss. On the other hand I believe we have derived as much intellectual gain as we are likely to receive from his acquaintance. Therefore I recommend we do no further business with him.

(R4, tab 195)

37. On 3 August 1979, Kilovac communicated its views to appellant regarding the above-noted problems and suggested that appellant should accept return of 57 of the 69 relays. At this time appellant had requested Kilovac to submit a quote for 435 relays with delivery to begin in October 1979. In response to this request, Kilovac stated that it would be unable to quote on the relays until a resolution of the matter concerning the 69 rejects was

achieved (R4, tabs 197, 198).

38. On 27 August 1979, appellant called the DCASR office and requested that Kilovac be sent a copy of the Defense Priorities System Bulletin. It was appellant's view that Kilovac "would shape up if they knew the Government meant business" (R4, tabs 206, 208; tr. 1302, 1391). Regarding Kilovac's proposal to return the 69 relays, appellant had advised Kilovac that it would not buy these relays because they didn't meet the relay requirement on the drawing; however, appellant further advised that if Kilovac insisted on its submission, it would request the Government review the functional requirements, as opposed to the drawing requirements, to determine if there was a possibility of getting some kind of a waiver on these relays (tr. 1385).

39. On 19 September 1979, appellant informed the contracting officer concerning the question of a waiver:

> We are not privy to the wiring schematic between the coils of these relays and circuits off [sic] the case of the 9016346 Network. So, we don't know how much in-service variation of relay parameters is actually tolerable. However, we do know that sometimes WECO did not spend much time putting down the limits on paper and then later the limits became major headaches in production. We have worked out some of these already, and we think Ref (b) [OPN 9755026] needs work now.
>
> With these relays, we have already "worn out" one manufacturer with our tight-to-spec inspection and numerous rejections, and we are in danger of losing another, who is apparently the last responsible one.
>
> Although we still inspect to Ref(a) [OPN 9016346] "unmercifully", we have noted that perhaps the requirements should change now: re-specification of

pull-in, drop-out, hold, stability, etc would in our opinion improve reliability and also make the unit much more producible. We have accumulated our knowledge after having processed thousands of these relays in this very assembly.

***

At this time we are working with DCASR-Los Angeles to force our subcontractor to continue making this part to complete Ref (a), which he wants to breach, and the outcome could go either way, he is so despondent.

Progress on changing the requirements would give him a symbolic lift and might get the parts without exerting muscle. Otherwise, there would be an impact yet unknown on final deliveries for Ref (a).

In our opinion, the changes we will propose will not affect the cost nor degrade the operational reliability of the relay. Any saving will doubtless be taken by inflation. The extent of reliability increase depends also on other non-related factors.

We would be pleased to get your approval to confer as soon as possible.

(R4, tab 221)

40. On 2 October 1979, respondent advised appellant that its proposal was being evaluated by technical personnel, but reminded appellant that delivery on Contract - 0179 was due on 16 October 1979 (tr. 1399; R4, tabs 12, 226). Appellant performed no production work during the period from 16 October 1979 until termination. Its only activities consisted of contacts with Kilovac and other potential suppliers. Appellant's reply to respondent's 7 November 1979 show cause letter so indicates and summarizes appellant's difficulties in this regard

(R4, tab 15). On 17 December 1979, respondent terminated appellant for untimely delivery of the units (R4, tab 2).

41. In November 1979, Kilovac's marketing vice-president was about to write a letter to McQuiston, stating that Kilovac's management had finally concluded they could perform no further rework or replacement of rejected parts under the instant contract (R4, tab 18). He had asked DCASR if stopping activities under Contract - 0179 would jeopardize Kilovac's position as a supplier to the Defense Electronics Supply Center, or to other Government agencies. The DCASR representative indicated that the Government would not tell them how to run their business. He refrained from encouraging Kilovac not to deal with appellant telling Kilovac that their performance under appellant's subcontract was strictly between them and appellant, and the Government was not a party to it (tr. 1006, 1017).

DECISION

As we have found, appellant failed to deliver the 104 units due on 16 October 1979. Thus, appellant's apparent default created in respondent the right of immediate termination for default. The issue before us is whether or not appellant was in a default status at the time of termination of the instant contract, and if so, whether its failure to deliver was due to causes beyond the control and without the negligence of itself or its vendors. Appellant first contends that respondent waived the delivery date and that the 300 day period allowed in the instant contract for production was mistakenly short by 120 days due to a typograhical error. We disagree with both of these contentions.

The 300 day delivery period was deliberately established for bidders for whom the first article was waived.

This was not a mistake, as we have found. Regarding appellant's waiver argument, the case cited, *DeVito v. United States*, 188 Ct. Cl. 979, 413 F.2d 1147 (1969) is inapposite. That case stands for the proposition that a contract must be terminated within a reasonable time after appellant's default, or a constructive election not to terminate is created, requiring a notice containing a new schedule for performance before termination can be effected.

However, in *DeVito* the contractor had continued to perform following the defaulted delivery date with the Government's knowledge, and the Government had given the contractor no inkling of its intention to terminate prior to the termination notice, some 48 days after the due date. In the instant case, although 63 days elapsed between the delivery date and termination, the 7 November show cause letter served to inform appellant of respondent's intent in a timely fashion, and final termination occurred within a reasonable period. Thereafter, even were we to conclude that this much elapsed time was excessive, there is no evidence that appellant in fact relied on any behavior or conduct of respondent, or made any tangible progress on the contract during this period. *Prestex, Inc.*, ASBCA No. 21284, *motion for recon.*, 81-2 BCA ¶ 15,397.

We now turn to appellant's other defenses. Among the various excuses for nonperformance argued, appellant points out that time extensions had been granted under earlier contracts for defects in the relay specifications.

Appellant contends that because respondent's specifications for the relays were defective, *i.e.*, impossible to procure, a time extension was justified. Appellant argues that respondent breached its implied warranty that the relay specifications would be suitable for use in the pulse

forming network; they were not, appellant contends, because the specifications failed to "list all the salient characteristics required to assure proper operation in the Network." (App. Opening Brief 1-2)

In this appeal, we have been impressed by an unassailable fact. There is no issue, here, regarding appellant's ability to make the pulse forming networks in question due to impossibility to procure the relays to respondent's specifications. Certainly, the relay problems appellant experienced were most complex and difficult. Yet, while appellant diligently insisted upon quality and specification compliance, it always succeeded in obtaining specification compliance from its vendors. Continually throughout its involvement with respondent's network procurements, appellant delivered to respondent acceptable pulse forming networks incorporating satisfactory relays.

Appellant's real concern is that respondent's default termination radically departs from the reaction appellant came to expect when it ran into trouble on the relays. Appellant argues that it had an understanding with respondent, relying upon prior mutual experiences under similar contracts, that respondent would grant a time extension to "appellant whenever trouble arose with the [relay] specification"; such an understanding was the condition, appellant argues, to its continued use of the alleged defective relay specifications. (App. Opening Brief 32, 36)

First, we cannot say that the evidence before us even suggests that the expectations of the parties at contract award manifested such an intent. The long history of appellant's involvement in procuring the pulse forming networks involved two experienced relay vendors who encountered the full range of problems; and, of course, appellant was privy to all of these difficulties. But, as we

have found, the time extensions over this period were not always granted for the same kinds of delay-causing problems. Moreover, respondent did not concede at any time—indeed, expressly disclaimed—any notion that its relay specification was defective. On one occasion, respondent exacted consideration from appellant in exchange for a time extension. Thus, the record fails to show any established pattern of conduct by the parties to support appellant's contention that respondent promised appellant a time extension anytime it ran into difficulties with the relays.

The cases cited by appellant to support its argument involve the application of the rule that the parties' conduct under prior similar contracts may well reflect how disputed language in the instant contract should be interpreted. *L.W. Foster Sportswear*, 186 Ct. Cl. 499, 405 F.2d 1285 (1969); *Gresham & Co. v. United States*, 200 Ct. Cl. 97; 470 F.2d 542 (1972).

In *L.W. Foster Sportswear*, which involved defective specifications for flying jackets, the contractor deviated from the specifications under prior similar contracts because it was "practically" or "virtually impossible" for the contractor to join certain seams in the flying jackets without causing abrasions and cuts that would later be subject to rejection. As we have noted, the relay specifications in the instant case were not impossible to meet. Moreover, problems encountered were not always the same and were consistently resolved by appellant's uncanny resourcefulness.

In *Gresham & Co.*, the Court of Claims found a clear specification requirement for an automatic detergent dispenser in dishwashing machines to have been suspended during the administration of earlier similar contracts giving rise to a reasonable belief on the part of the contractor that it would continue to be suspended with

respect to the contract in question. We find nothing in the evidence before us which would have given appellant any reasonable belief that the delivery schedule in the contract for which he competitively bid was waived or suspended in any way.

Although appellant had been granted time extensions under earlier contracts because of problems associated with the relays, we are convinced, regarding the instant contract, that it was appellant's intention to meet the original delivery dates, and that appellant could have met these dates. That appellant's president anticipated little if any difficulty evidences his intention in this regard.

Appellant delivered 112 networks between 29 June 1979 and 17 August 1979, leaving a balance due of 104 units to be delivered by 17 October 1979. Thus, appellant's rate of delivery was such that in less than 2 months, over half of the networks contracted for were completed. We have no doubt that appellant, accordingly, was capable of delivering the balance within the remaining two months. And when we consider appellant's diversion of 136 relays in the May-early June 1979 period, which relays its vendor was manufacturing for the instant contract (appellant made a business decision to utilize these relays on another contract and delivered 65 networks thereunder a year before they were due), our conclusion that appellant possessed the ability to deliver the balance of 104 units within the remaining two-month period is corroborated.

We have yet to determine whether or not appellant's failure to deliver the remaining 104 units was excusable. We are not persuaded by appellant's argument that the relay specifications were defective, *i.e.*, unsuitable for the pulse forming network, and that this therefore justified a time extension.

Appellant places great emphasis on the fact that the specified maximum test voltage of 15 KVDC for the relay was less than the 17 KVDC required for the pulse forming network (app. br. 39). Ostensibly, this inconsistency would result in a failure of the relays when the networks were tested. In order to correct this problem, appellant increased maximum test voltage for the relay to 18 KVDC. The difficulty we have with the appellant's argument in this regard is that we are unable to determine from the record that this inconsistency presented any delay-causing problems to appellant under the instant contract. Indeed Kilovac had little difficulty in complying with this high potential 18 KVDC test requirement. Secondly, this was not a test imposed by respondent, but one created by appellant because of its perception that the mismatch of the 15 KVDC peak test for the relays and the 17 KVDC test for the network was untenable. Finally, there is no evidence in the record to show that manufacturing relays to the lesser peak voltage presented difficulties to appellant when testing the network to the higher voltage. Thus, we are not persuaded by this aspect of appellant's contention that the alleged defectiveness of the relay specification caused appellant delay in performing the instant contract.

Nor are we convinced that appellant otherwise establishes an excuse for untimely delivery based upon defective relay specifications. Our consideration of appellant's intimate involvement in the early procurement of the pulse forming networks leads us to this conclusion. Respondent identified in the original Drawing 9755026 a brand name source, *i.e.*, Jennings Radio Part No. RB1D-26N202. This brand name identification was expressly "invoked for the convenience of [respondent and] not to be construed as restricting qualified sources of procurement." Appellant, at the outset of its involvement in

1964, instead of obtaining this brand designation, procured Jennings' Relay RB1K-26N368 which did not always comply with the specified operational requirements when submitted. Notwithstanding, such continuing problems, appellant adroitly managed to obtain relays from Jennings which permitted appellant to deliver acceptable pulse forming networks pursuant to its contract obligations for the next 10 years. Thus, in the developing pulse forming network procurement history, appellant, as a result of its experiences, had become extremely knowledgeable about the troublesome relays.

During the 1974-75 period, after experiencing many of the aforementioned difficulties with the Jennings Radio relays, appellant met with respondent's engineer who concluded from the discussion that the hipot 18000 VDC test failures, manifested by a flourescent glow caused by a seal leakage problem, presented the most critical problem to appellant. As appellant suggested that the specifications should be corrected to resolve this problem, it announced its intention to initiate a project to develop another source for the relays pursuant to its new "specification control drawing". Appellant wanted to control the relay to this new specification and felt that based on its long experience and under its engineering control, it would implement this new specification embodying the requirements of Drawing 9755026 as well as other requirements essential to assuring component quality. This would not cost respondent under its current contract, but appellant gave notice to respondent that it would charge respondent extra under future procurements.

Appellant, indeed, cultivated an alternate source, Kilovac Corporation, who went on to furnish relays to appellant during the 1974-75 contract period. Appellant satisfactorily delivered 109 pulse forming networks thereunder to respondent utilizing Kilovac relays purchased to

appellant's new specification control drawing. Kilovac would furnish the same relays under the instant contract. Thus, upon entering the instant contract, appellant certainly knew about every problem that could be encountered regarding the relays and appeared to have all of its problems behind it. In performing the contract, the record does not indicate that appellant encountered any problems with the relays which differed in kind from those experienced earlier.

Thus, we are unable to determine from the record precisely the nature of the defectiveness appellant alludes to regarding the relay specifications. And, without concluding that the specifications were in fact defective, under these circumstances, appellant must be viewed as having entered the contract with full and complete knowledge of the inherent problems of the relays and must be viewed as having assumed the risk of any such problems since it had the opportunity to avoid the contract at the outset. In any event, as it had previously indicated, appellant intended to charge the Government extra for its resolution of the relay problems it had previously encountered. Moreover, appellant's failure to deliver was caused by its subcontractor's failure and there is no showing that this was excusable. Since the default clause requires that the failure of both the prime and the sub must be excusable, this defense fails.

Appellant also alleges that the respondent failed to meet its obligations concerning priorities assistance. The issue before us at the hearing was if true, whether such failure excused appellant's inability to deliver the overdue networks. While we are not convinced that appellant specifically addressed this issue in its brief, we will do so here and thereafter proceed to the other arguments appellant sets forth regarding priorities assistance. We first note that delays in a "contractor's performance caused by

the operation of the Government's priorities system may be excusable and entitle the contract to an extension of the delivery dates." *Prestex, Inc.*, ASBCA Nos. 21284, 21372, 21453, 21467, 23184, 81-1 BCA ¶ 14,882 at 73,609. However, the contractor must establish a causal connection between the operation of the priority system and its delay or failure to perform. *C.C.C. Construction Company, Inc.*, ASBCA No. 20586, 77-1 BCA ¶ 12,272; *Hogan Mechanical, Inc.*, ASBCA No. 21612, 78-1 BCA ¶ 13,164.

In this case appellant, although familiar from past experience with the particulars of the operation of the priority system, made a calculated decision to postpone utilizing that system in favor of pressing other options that it considered more likely to obtain satisfactory performance. It was not until several weeks after the contract delivery date had passed that appellant filed the request for priority assistance.

This Board has previously held that such failure to make a timely request for Government assistance "precludes whatever entitlement the contractor may otherwise have had to assistance from the procuring activity in obtaining needed materials." *Texoma Construction, Inc.*, ASBCA No. 20924, 77-1 BCA ¶ 12,449. A request subsequent to the contract's completion dates obviously fails to meet this requirement and clearly establishes the lack of a causal connection between the operation of the priority system and appellant's inability to perform. *Hogan Mechanical, Inc., supra.*

Appellant also makes the argument that respondent failed to terminate for default in accordance with the provision of the Default clause. Appellant points out that the clause does not require termination in the event of a default, "but . . . [respondent] . . . 'may' . . . terminated

[sic] provided certain regulations are observed." Appellant argues that "[n]o contractor notification was permitted until *after*" the contracting officer had considered the seven factors set out in DAR 8-602.3. These factors were to be considered by the contracting officer in addition to the default itself. For example, appellant claims that the termination was defective because respondent failed to notify the Small Business Administration (SAB) of its action, as required by DAR 8-602.3(b)(4). However, the language of that provision requires only that a copy of any cure notice or show cause letter be provided to the SBA "as a matter of information"; it requires no action by the SBA in response. Appellant has failed to show how failure to comply with this provision prejudiced its position. This noncompliance does not provide appellant with any basis for relief. *Omni-Wave Electronics Corporation*, ASBCA No. 23465, 80-2 BCA 14,552. We have considered all of the other arguments appellant has made concerning its allegation that respondent's default termination was procedurally defective, and we find them unpersuasive.

Regarding appellant's contentions that the Government interfered with its attempts to obtain relays from Kilovac, its relay vendor, we have found nothing in the record to support this contention. As appellant put it, it had "worn-out" its vendor with its insistence for total compliance with the relay specification. There is evidence to indicate that Kilovac was arriving at a decision of its own to discontinue its relationship with appellant. We have found nothing in the record to even suggest any action on the part of respondent to aid or abet Kilovac in this regard.

Since appellant has failed to show that its failure to make timely delivery was not due to excusable causes, we must conclude that its contract was properly terminated for default.

The appeal is denied.

Dated 22 November 1982.

/s/ ROBERT J. GOMEZ
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

Appendix C

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 24676

Appeal of — McQuiston Associates

Under Contract No. DAAH01-79-C-0179

Appearances for the Appellant:

Mr. J. H. McQuiston, *pro se*

Appearances for the Government:

Colonel C. T. Lakes, JAGC

Chief Trial Attorney

Major W. Eric Pedersen, JAGC

Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GOMEZ ON APPELLANT'S MOTION FOR RECONSIDERATION

On 4 January 1983, appellant filed its Motion for Reconsideration of the Board's decision (83-1 BCA ¶ 16,187) indicating generally it had ". . . a serious objection with almost every single . . ." finding of fact, and that we had ignored the issues in our decision. Respondent replied arguing that appellant presented bare conclusions and that the Motion should be denied for lack of support. Our review of appellant's Motion led us to agree with Respondent's views; however, we gave appellant additional time to furnish support for the grounds set forth in its Motion. On 23 February 1983, the Board received appellant's supplemental response. Respondent has chosen not to reply to this latter submission.

Appellant complains that he was somehow deprived of a hearing in the subject appeal. A seven day hearing was held during which the Board received testimonial and voluminous documentary evidence from appellant. Thereafter, the record was left open for a period of 13 months during which appellant was given an opportunity to file additional evidence with the Board. Thereafter with agreement by the parties and subsequent to the filing of post-hearing and reply briefs, the record was closed and considered ready for decision. Thus, appellant's allegations that it did not have an opportunity to present its case is totally without merit.

We note that appellant's most recent submission contains voluminous objections to our fact findings; we cite several examples. Appellant objects to "repair parts" being called "radar 'components' ", to our failure to mention that appellant was licensed, operated as an individual proprietorship, and was competent to contract with the Government. Appellant also objects to our omitting certain facts in our recitation of the history of the network procurement, but fails to indicate where in the record these omitted facts can be found. In any event, none of the aforementioned objections are pertinent to our decision, thus we will make no further comment on these and other similar objections cited by appellant in his motion.

Appellant does complain that a "diagram" is improperly referenced as "Exhibit A-1". Appellant correctly points out that Exhibit A-1 refers to an affidavit of the Contracting Officer. The appropriate reference to the diagram is "Exhibit A-6," appellant's sketch schematically showing the so-called "contact gap" in the context of the operating parts of the relay. This diagram was included in the Board's decision for illustration only. Appellant's objections to its being ". . . inaccurate and

unfit for the purpose intended in the Opinion" therefore is without merit.

Appellant also corrects our finding no. 35. Kilovac informed appellant that it would not perform further work under its subcontract on 26 November 1979, not 28 November 1979 as we indicated (R4, tabs 18, 249).

We have reviewed appellant's other exceptions to the board's findings and are unable to find any significant or persuasive matters which would otherwise alter our findings or merit our attention here.

Regarding our decision, appellant takes issue with the Board's delineation of the issues, in particular, the Board's failure to address the issues as stated by appellant in its brief. In this regard, after several pre-hearing conferences with the parties, the Board with the assistance of the parties delineated the specific issues to be tried and decided in this appeal. And, indeed, we have thoroughly discussed and decided these issues. Notwithstanding, appellant believes that the Board failed to consider a number of issues, in particular, its contention that the Board "... *cannot* permit the 'default' clause to operate here ...", since " ... Respondent incorporated the [Defense Production Act of 1950 § 707 as amended (50 U.S.C. App. § 2157)] in the IFB ...." (Emphasis appellant's Motion at 25) To support this argument, appellant cites *Climatic Rainwear Co., Inc. v. United States*, 115 Ct. Cl. 520, 88 F. Supp. 4154 (1950). While our decision has already considered this issue, we will elaborate further.

Appellant's citation of *Climatic Rainwear, supra*, is inapplicable to the instant situation. In that case, the Court found that there had been no consideration of plaintiff's proof of the causes of delay which led to the default termination there. In particular, the Court noted that the Government's findings attributed the alleged

inexcusable delay to plaintiff's election to complete its subcontract before performing its prime contract. The Court rejected this because these findings ran afoul of the Second War Powers Act and the regulations issued thereunder which prohibited imposition of liability for ". . . and default under any contract which shall result directly or indirectly from compliance . . ." with such regulations. See § 301 of the Second War Powers Act, 56 Stat. 177-180, 50 U.S.C. War App. § 633, enacted 27 March 1942. The Court stated that this Act had for its purpose to establish priorities in connection with war contracts and subcontracts. It noted out that both the " . . . subcontract and the subsequent prime [terminated] Contract . . . bore identical priorities ratings . . . and in plaintiff's request for an extension of time for delivery under the [terminated] Contract it had pointed out its obligation to complete deliveries on its subcontract before proceeding . . . [with the terminated contract]."

Here appellant did not comply with the requirements of the priorities system in place. As we stated in our decision (at 80,441):

> [D]elays in a "contractor's performance caused by the operation of the Government's priorities system may be excusable and entitle the contractor to an extension of the delivery dates." *Prestex, Inc.*, ASBCA Nos. 21284, 21372, 21453, 21467, 23184, 81-1 BCA ¶ 14,882 at 73,609. However, the contractor must establish a casual connection between the operation of the priority system and its delay or failure to perform. *C.C.C. Construction Company, Inc.*, ASBCA No. 20586, 77-1 BCA ¶ 12,272; *Hogan Mechanical, Inc.*, ASBCA No. 21612, 78-1 BCA ¶ 13,164.
>
> In this case appellant, although familiar from past experience with the particulars of the operation of

the priority system, made a calculated decision to postpone utilizing that system in favor of pressing other options that it considered more likely to obtain satisfactory performance. It was not until several weeks after the contract delivery date had passed that appellant filed the request for priority assistance.

This Board has previously held that such failure to make a timely request for Government assistance "precludes whatever entitlement the contractor may otherwise have had to assistance from the procuring activity in obtaining needed materials." *Texoma Construction, Inc.*, ASBCA No. 20924, 77-1 BCA ¶ 12,449. A request subsequent to the contract's completion dates obviously fails to meet this requirement and clearly establishes the lack of a casual connection between the operation of the priority system and appellant's inability to perform. *Hogan Mechanical, Inc., supra.*

We note finally that appellant continues to complain of this board's noncompliance with 5 USC 552 and 554 and to refer to his individual "liberty". We merely add that the issues in this case are those arising under appellant's contract and the mutual contractual rights and obligations of the parties. We do not reach the constitutional issue of "liberty", as appellant attempts to define it, nor are we concerned with the procedures of the Administrative Procedures Act since we are proceeding under the Contract Disputes Act and the Board's Charter and Rules.

We have considered appellant's other arguments and are unable to discern any basis for setting aside our decision. As we decided, appellant has failed to show that its failure to make timely delivery was due to excusable causes. Accordingly, our prior decision that appellant's

contract was properly terminated for default, is reaffirmed. Appellant's Motion for Reconsideration is denied.

Dated 24 May 1983.

ROBERT J. GOMEZ
Administrative Judge
Member of Division No. 4
Armed Services Board
of Contract Appeals

I *concur*

V. JOHN RHISMANDEL
Administrative Judge
Member of Division No. 4
Armed Services Board
of Contract Appeals

I *concur*

MAXWELL C.
FREUDENBERG
Administrative Judge
Member of Division No. 4
Armed Services Board
of Contract Appeals

I *concur*

HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I *concur*

DANIEL M. ARONS
Administrative Judge
Vice Chairman, Armed
Services Board of
of Contract Appeals

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 84-578

J. H. McQUISTON,
Appellant,
v.
THE UNITED STATES,
Appellee.

ORDER

Upon reading and consideration of appellant's motion to join additional parties defendant and appellee's opposition thereto it is

ORDERED that appellant's motion to join additional parties defendant is denied.

OSCAR H. DAVIS
CIRCUIT JUDGE

DATED: JANUARY 24, 1984

WASHINGTON, D.C.

Appendix E

United States Court of Appeals for the Federal Circuit
Appeal No. 84-578.
J. H. McQUISTON,
Appellant,
v.
THE UNITED STATES,
Appellee.

DECIDED: July 20, 1984

Before Markey, *Chief Judge*, KASHIWA, and MILLER, *Circuit Judges*.
MILLER, *Circuit Judge*.

DECISION

The decision of the Armed Services Board of Contract Appeals ("board"), ASBCA No. 24676, sustaining the contracting officer's termination for default on Contract No. DAAH01-79-C-0179 ("0179") due to appellant's failure to deliver on time, is *affirmed*.

OPINION

Appellant's argument that this court should employ a de novo standard of review lacks merit because the contract in question incorporated by reference a standard disputes clause (Armed Services Procurement Regulation 7-103.12(a)) providing for the resolution of all disputes by a board of contract appeals. The disputes clause and its limited remedies have been approved by the Supreme Court. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 420 (1966).

The dispositive issue is whether, with respect to the facts, the decision of the board is fraudulent, arbitrary, capricious, so grossly erroneous as necessarily to imply

bad faith, or not supported by substantial evidence. 41 U.S.C. § 609(b).[1] We hold for the Government on this issue.

An essential factor in appellant's failure to complete performance in a timely manner of 0179 was his own business decision to use networks ordered for 0179 to prematurely complete the more profitable Contract No. DAAH01-79-C-0621 ("0621") on June 15, 1979, although delivery for 0621 was not required until April 21, 1980. This decision was sufficient to break any pattern established by the Government in liberally granting extensions of time for appellant's performance because of supplier difficulties.

With respect to appellant's arguments under the Defense Production Act, 50 U.S.C. §§ 2061, et seq., the 0179 contract incorporated by reference a standard clause entitled "Priorities, Allocations, and Allotments" which obligated appellant to:

> follow the provisions of DMS Reg. 1 or DPS Reg. 1 and all other applicable regulations and orders of the Bureau of Domestic Commerce in obtaining controlled materials and other products and materials needed to fill this order.

Under the applicable Defense Priorities System Regulation 1 ("DPS Reg. 1"), as revised July 1, 1974, (32A C.F.R. Part 651, Sec. 16(b) [presently appearing at 15 C.F.R. Part 350, Sec. 16(b)]), appellant was to use the following sequence in filling "rated orders";

> A person who has accepted rated orders must schedule his operations, if possible, to fill each rated order by the required delivery or performance date,

---

[1]The board's conclusions of law are, of course, freely reviewable by this court. *Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1386 (Fed. Cir. 1983).

> regardless of the sequence in which the orders were received. If this is not possible, he must give precedence as follows:
>
> . . . .
>
> (b) As between conflicting rated orders of equal priority status, precedence shall be given to the order which was received first.

If a contractor with a rated order is unable to obtain materials, he is entitled to an excusable delay only if he has complied with the requirements of the priorities system. 2 R. Nash and J. Cibinic, *Federal Procurement Law* 2303 (3rd ed. 1980). *See Prestex, Inc.*, ASBCA Nos. 21284, 21372, 21453, 21467, 23184, 81-1 BCA ¶ 14,882 at 73,608-10. Similarly, although the Government may otherwise be liable for damages for failure to give priorities assistance within a reasonable time after a timely request, a contractor must show that all the requirements of the priorities system have been complied with in order to prevail on such a claim. Nash and Cibinic at 2305.

We are persuaded that the board committed no prejudicial procedural errors; also, that the board's finding that, at the time of the award of 0179, appellant and his current supplier expected no technical difficulties arising from the agreed-upon specifications, is supported by substantial evidence; further, that appellant has not shown that its failure to make timely delivery was due to excusable causes.

In view of the above, it is unnecessary to reach appellant's contentions of violations of civil rights and constitutional torts. As to appellant's allegations of antitrust violations, jurisdiction over an antitrust claim belongs, in the first instance, in the federal district court. 15 U.S.C. § 4. A board of contract appeals can only give relief to the extent permitted by the provisions of the contract. *R.W.*

Borrowdale Co., ASBCA No. 20264, 75-2 BCA ¶ 11,560 at 55,189-90. We do not consider this issue, which was not (and could not have been) addressed below and which was raised for the first time on appeal. *International Seaway Trading Corp. v. United States*, 488 F.2d 544, 547 (CCPA 1973).

Finally, we are satisfied that the board properly refused to consider appellant's claims under the Administrative Procedure Act (5 U.S.C. §§ 701, et seq.). An abuse of agency discretion can be the subject of board review if it pertains to a matter otherwise within the board's authority. However, the law of contracts, not the Administrative Procedure Act, is the source of the board's authority to review and correct such an abuse. *Ray & Ray's Carpet & Linoleum, Inc.*, GSBCA No. 5666, 83-1 BCA ¶ 16,184 at 80,419.

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-904

In the Supreme Court of the United States

OCTOBER TERM, 1984

J. H. MCQUISTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8pp

TABLE OF AUTHORITIES

Page

Cases:

Acorn Iron & Supply Co. v. *Bethlehem Steel Co.*, 96 F. Supp. 481 5

Crowell v. *Benson*, 285 U.S. 22 ..... 4, 5

Northern Pipeline Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 ..... 4, 5

United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 ..... 3, 4

Statutes and regulation:

Contract Disputes Act of 1978, 41 U.S.C. 609(b) 4

Defense Production Act of 1950, 50 U.S.C. App. 2061 *et seq.* 2

50 U.S.C. App. 2071 5

50 U.S.C. App. 2073 5

50 U.S.C. App. 2156 5

28 U.S.C. 1471(b) 4

32 C.F.R. 8-602.1 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

J. H. MCQUISTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a defense contractor, contends that the court of appeals erred in affirming the decision of the Armed Services Board of Contract Appeals upholding the termination of petitioner's contract for default.

1. Petitioner manufactured radar components called "networks" for a missile guidance system. Between 1964 and 1980, he entered into 12 contracts with the government for delivery of networks (Pet. App. A4). With respect to many of these contracts, including the one at issue here, petitioner experienced difficulty obtaining from suppliers a part, known as a "relay," that was necessary for manufacture of the networks.

Petitioner entered into the contract at issue in December 1978; it called for delivery of 216 networks by October 16, 1979 (Pet. App. A26). In March 1979 petitioner entered into another contract, calling for delivery of 65 networks by April 21, 1980 (*id.* at A27). Because the sales price was

higher under the second contract, petitioner used relays he had ordered for the contract at issue in networks delivered under the second contract (*ibid.*). Delivery of the 65 networks under the second contract was made in June 1979 (*ibid.*). Petitioner subsequently delivered 112 of the 216 networks under the contract at issue, but, on October 16, 1979, the delivery date under the contract, the remaining 104 networks had not been delivered, due to a lack of relays (*id.* at A27-A28).

The contract was subject to the Defense Priorities System established pursuant to the Defense Production Act of 1950, 50 U.S.C. App. 2061 *et seq.* (Pet. App. A28). Under this system, defense contractors may seek government assistance in obtaining delivery from nonperforming suppliers (*id.* at A28-A29). Petitioner did not seek government assistance in obtaining delivery of the relays under the Defense Priorities System until after the delivery date had passed (*id.* at A44). The contracting officer in charge of petitioner's contract found him in default and terminated the contract on December 17, 1979 (*id.* at A36).[1]

2. Petitioner challenged the termination before the Armed Services Board of Contract Appeals. After a hearing, the Board found that petitioner contributed to his delinquency by diverting relays ordered for the first contract to the second contract (Pet. App. A40). It also found that petitioner was familiar with the procedures for obtaining government assistance under the Defense Priorities System and made a calculated decision not to use that system before the delivery date (*id.* at A44). The Board concluded that a request for government assistance made after the

---

[1]The applicable regulations provide that "the Government has the right * * * to terminate the whole or any part of the contract for default if the contractor (i) fails to make the delivery of the supplies * * * within the time specified in the contract" (32 C.F.R. 8-602.1).

delivery date is untimely (*ibid.*). Accordingly, the Board concluded that petitioner had not shown that his failure to make timely delivery was due to an excusable cause and held that the contract was properly terminated for default (*id.* at A45).

Petitioner sought review of the Board's decision in the Federal Circuit, arguing that he was entitled to de novo consideration of his claims by the appellate court. The court of appeals held that, under *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), petitioner was not entitled to de novo review (Pet. App. A54). Instead, the standard was whether the Board's factual determinations were supported by substantial evidence (*id.* at A54-A55). The court added that the Board's "conclusions of law are, of course, freely reviewable by this court" (*id.* at A55 n.1). The court affirmed the Board's decision, observing that an "essential factor" in petitioner's failure to complete performance of the contract in a timely manner was his own business decision to use parts ordered for the contract at issue so that he could make early delivery of networks under the subsequent, more profitable contract (*id.* at A55). The court concluded that the finding of default was proper because petitioner "has not shown that its failure to make timely delivery was due to excusable causes" (*id.* at A56).

3. Petitioner first contends (Pet. 19-25) that the court of appeals erred in refusing to consider his factual claims de novo. Petitioner does not specify what claims were erroneously rejected by the court of appeals because it applied the substantial evidence standard. Moreover, petitioner offers no plausible basis for his contention that he was entitled to de novo review of his factual claims. As the court of appeals concluded (Pet. App. A54), this Court held in *Utah Construction* that factual issues concerning government contracts that are resolved by an administrative board are not to be tried de novo by a reviewing court (384 U.S. at

419-420). Congress adopted that standard in the Contract Disputes Act of 1978, 41 U.S.C. 609(b), expressly providing that factual determinations by boards of contract appeals are "final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence".[2]

Contrary to petitioner's argument, the Court's decision in *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), does not entitle him to de novo review of factual issues by an Article III court. The Bankruptcy Act at issue in *Northern Pipeline* conferred on Article I bankruptcy judges the full jurisdiction of district courts in proceedings "related to" bankruptcy cases. 28 U.S.C. 1471(b). In contrast, the Contract Disputes Act provides for adjudication of a narrow category of statutory contract rights created by Congress. The Court recognized in *Northern Pipeline* that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated" (458 U.S. at 80, citing *Crowell* v. *Benson*, 285 U.S. 22 (1932)).[3] Thus, *Northern Pipeline* does not support petitioner's far-reaching contention that factual determinations of agency boards must be reconsidered de novo by an Article III court.[4]

---

[2]The Act provides that "the decision of the agency board on any question of law shall not be final or conclusive" (41 U.S.C. 609(b)).

[3]The "related cases" over which bankruptcy courts exercised jurisdiction involved adjudication of "private rights." The Contract Disputes Act, in contrast, involves "public rights," over which Congress has broad discretion, since disputes under the Act involve the government and a private party, with the private party's suit permitted by the government's waiver of sovereign immunity. See *Northern Pipeline Co.*, 458 U.S. at 67-72.

[4]Indeed, the discussion in the *Northern Pipeline* plurality opinion of the distinctions between *Northern Pipeline* and *Crowell* v. *Benson*, *supra*, shows that the congressional scheme for adjudication of

Petitioner also contends (Pet. 25-34) that the court of appeals erred in upholding the termination of his contract because it thereby approved the imposition of a penalty not authorized by the Defense Production Act. He argues that this decision is inconsistent with *Acorn Iron & Supply Co.* v. *Bethlehem Steel Co.*, 96 F. Supp. 481 (E.D. Pa. 1951), in that respect. Petitioner is mistaken. The Defense Production Act authorizes the President to establish priorities for performance by suppliers under certain defense contracts (50 U.S.C. App. 2071). It permits the President to seek injunctions against violators of the statute (50 U.S.C. App. 2156) and establishes criminal penalties for such violations (50 U.S.C. App. 2073). In *Acorn,* the district court simply held that only the government, and not a contractor seeking to compel performance by his supplier, could invoke the remedies listed in the Defense Production Act. The decision in *Acorn* is not relevant to the issue presented by petitioner. Nothing in *Acorn* or the Defense Production Act limits the government's power to terminate an overdue contract.[5]

---

government contract disputes is permissible. First, the plurality noted that "the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law" (458 U.S. at 85). Boards of contract appeals make similarly specialized determinations. Second, "the agency in *Crowell* engaged in statutorily channeled factfinding functions" (*ibid.*). The Contract Disputes Act channels the activities of boards of contract appeals. Third, while the agency in *Crowell* possessed limited powers, the bankruptcy courts challenged in *Northern Pipeline* had broad powers, including the power to preside over jury trials, the power to issue declaratory judgments, and the power to issue writs of habeas corpus (*ibid.*). The power of boards of contract appeals is relatively limited. Fourth, "while orders issued by the agency in *Crowell* were to be set aside if 'not supported by the evidence,' the judgments of the bankruptcy courts are apparently subject to review only under the more deferential 'clearly erroneous' standard" (*ibid.*). The factual findings of boards of contract appeals are judged by the less deferential "substantial evidence" standard.

[5]Petitioner repeatedly suggests (Pet. 24, 25, 29) that there is a conflict among the circuits on the issues he raises, but he does not explain the nature of this conflict or list the cases allegedly in disagreement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1985

DOJ-1985-02

Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-904

In The Supreme Court

OF THE

United States

OCTOBER TERM 1984

J. H. MCQUISTON,
Petitioner,
VS.
THE UNITED STATES,
Respondent.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

B. ALAN DICKSON
KAUFMAN, FRANKLIN & DICKSON
Century Park Center
9911 West Pico Blvd., Suite 650
Los Angeles, California 90035
Telephone: (213) 553-3351
Attorneys for Petitioner

12pp

TABLE OF AUTHORITIES

	Page
Acorn Iron v. Bethlehem Steel Co, 96 F Supp 481 (E.D. Pa 1951)	4, 5, 9
Buckley v. Valeo, 424 U.S. 1 (1976)	2
Eastern Air Lines v. McDonnell Douglas, 532 F2d 957 (5 Cir 1976)	6, 3, 6
I.N.S. v. Chadha, _____ U.S. _____, 103 S. Ct 2764, 51 LW 4907 (1983)	2
In re Agent Orange Litigation, 597 F Supp 740 (MDL, E.D.N.Y. 1984)	3, 4
Lynch v. U.S., 292 U.S. 571 (1934)	2
McDonnell Douglas Corp, 83-1 BCA ¶16,377 (1983)	5
McQuiston, 83-1 BCA ¶16,187 (1983)	5
Mt Healthy School Dist v. Doyle, 429 U.S. 274 (1977)	7
Roxford Knitting v. Moore & Tierney, 265 F. 177, (2d Cir. 1920)	6
U.S. v. Bianchi, 373 U.S. 709 (1963)	6
U.S. v. Grace & Sons, 384 U.S. 424 (1966)	6
U.S. v. Texas Construction, 224 F2d 289 (5 Cir 1955)	3
U.S. v. Utah Construction, 384 U.S. 394 (1966)	5, 6
Village of Arlington Hts v. Metro Housing Dev, 429 U.S. 252 (1977)	7
Woods Hole v. U.S., 677 F2d 149 (1 Cir 1982)	5
Constitution, Statutes, & Regulations:	
Art III	2, 6, 9
Amt V	2
50 U.S.C. App §§2061 *et seq* (Defense Production Act)	*passim*
50 U.S.C. App §2073	2
§2152	2, 5, 9

Constitution, Statutes, & Regulations (cont):
50 U.S.C. App §2156 ..... 2, 9
§2157 ..... 2, 3
15 C.F.R. 350 2
32A C.F.R. 651 2

Miscellaneous:
Madison: *The Federalist,* No 47 2
Memorandum on Constitutionality of Sec 2751, P.L. 98-369, U.S. Dept of Justice, Office of Legal Counsel (1984) 2
Report of Chairman, ASBCA, Regarding Yearly Transactions and Proceedings 1
S. Rep 82-1599, 82d Congress (1952) 4
U.S. Code Congressional & Administrative News (1952) 4

No. 84-904

In The Supreme Court of the United States

OCTOBER TERM 1984

J. H. MCQUISTON, *Petitioner,*

VS.

THE UNITED STATES, *Respondent.*

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The argument set forth in the Memorandum of Opposition raises issues, which necessitates a Reply thereto.

1. The Solicitor General, for Respondent, admitted to a belief that a U.S. agent, which procures goods for resale to customers at a profit, is engaging in a "public" act (jure imperii) and not a commercial or "private" act (jure gestionis). That admission is proof that Petitioner McQuiston correctly characterized the First Question he put to this Court as substantial and controversial.

It is substantial because it affects Constitutional rights to just compensation and due process not only for McQuiston but also for 12 million contractors *every year.* It is controversial because the aforementioned belief of the Solicitor General is being used *unfairly* in ASBCA to confiscate just compensation and due process rights of over 1,000 involuntary contractors *every year.*[1] Nearly 65% of contractors treated thusly are small businesses, unable to bring injustices to this Court for proper review thereof.

Unless this Court grants certiorari in this case, agencies will continue to *force* substantial numbers of unwilling small busi-

[1]Source: Yearly Report of Chairman, ASBCA, to Secretaries, DOD/Army/Navy/Air Force, re Transactions & Proceedings in ASBCA.

nesses into ASBCA, abusing a contractor's Constitutional right to an independent adjudicator. Such unfair process also abuses the Board's adjudicators, who feel the threat of replacement if their decisions do not curry favor with the agencies.[2]

> In *I.N.S. v Chadha,* ____ U.S.____ (1983), this Court said: "Questions may occur which we would gladly avoid; but we cannot avoid them."

McQuiston believes that Question One has now been presented in an unavoidable case for this Court to decide.

2. The Solicitor General also admitted to a belief that Sec. 101 of the Defense Production Act (DPA) empowers the President to compel the production of materiel for National Defense at the President's sole discretion, and that any person refusing to produce shall be punished as a criminal under 50 U.S.C. App. §2073.[3] But the Solicitor General admitted to a belief that the *quid pro quo* for such power, immunity guaranteed by Sec. 707 (50 U.S.C. App. §2157), is revocable by the *agency party* to the contract, despite contrary language in 50 U.S.C. App. §§2152(a) & 2156(b).[4] Those admissions are proof that McQuiston correctly characterized the Second Question he put to this court as substantial and controversial.

It is substantial because it affects Constitutional rights to just compensation, equal protection and due process not only for McQuiston but also for the 12 million contractors jeopardized in

---

[2]October 17, 1984, the DOJ Office of Legal Counsel, citing *Buckley v Valeo,* 424 U.S. 1, 120-21 (1976) and *The Federalist,* No 47, essentially *agreed with McQuiston* that forcing commercial contracts of U.S. into non-Art III forums is unconstitutional. See DOJ *Memorandum on Constitutionality of* Sec 2751, P.L. 98-369, slip op at 8-9 (1984).

[3]Also, 32A CFR 651 (now 15 CFR 350) Sec 28(b) prescribed that any person refusing cooperation with DPA procurements may be enjoined from making any purchases or sales, or using any materials or facilities, whatsoever.

[4]But the U.S. may not retroactively abridge a contractual right (immunity) granted as *quid pro quo,* after receiving value. Amt V; *Lynch v. U.S.,* 292 U.S. 571, 579 (1934).

#1, supra. It is controversial because the Solicitor General's theory would render every citizen defenseless against confiscatory procurement acts of agencies taken in the name of National Defense.

For exactly the same reason as in #1, supra, McQuiston believes that Question Two has now been presented in an unavoidable case for this Court to decide.

3. The Solicitor General denies that CAFC's reading of DPA conflicts with other Circuits, and in the Memorandum n.5 challenged McQuiston to Reply with evidence of the conflict. Without overloading this Reply, McQuiston cites *In re Agent Orange Litigation*, 597 F Supp 740 (MDL, E.D. N.Y. 1984), wherein at 843-845 the Chief Judge in the Multi-District Litigation was required to decide whether Sec. 707 (50 U.S.C. App. §2157) immunized DPA contractors from product-liability tort actions as well as from contractual default actions. The court cited *Eastern Air Lines v. McDonnell Douglas*, 532 F2d 957 (5 Cir 1976), as did McQuiston in support of this reading of Section 707.[5] In conclusion the *Orange* court said:

> "that Section 707 was enacted as the *quid pro quo* to Section 101, the section authorizing the President to compel acceptance and give high priority to defense contracts." *Agent Orange*, 597 F Supp at 845.

Eastern of course cites an avalanche of cases from various Circuits and from this Court, too numerous to mention.

While *U.S. v. Texas Const. Co*, 224 F2d 289 (5 Cir 1955) describes a close parallel to the case at bar, DPA wasn't enacted before the time the *Texas* contract was entered into.

---

[5]See, e.g., 532 F2d 957 at 992-998. The court decided that even informal telephone requests are "orders" under DPA, and that "even if we were to conclude that the DPA did not authorize informal priority efforts, McDonnell would be exonerated by a provision of the Act which exculpates any compliance with a government order regardless of whether it is later determined to be invalid. 50 App. U.S.C. §2157." *Eastern* at 994 n.105.

But *Acorn Iron v. Bethlehem Steel*, 96 F Supp 481 (E.D. Pa 1951) is on all fours with this case.[6]

Merely by affirming that the prohibition of penalties as set forth in *Acorn* applies to penalty clauses of agencies party to DPA contracts, this Court will settle the controversy and enable McQuiston to obtain restitution for the unfair "taking". Thus McQuiston will be able to resume practicing his real profession as a "think-tank" and engineer.

Surely these chains of authorities, unanimously and solidly supporting the interpretation McQuiston has urged upon every adjudicator including this Court, and totally at odds with CAFC's interpretation of DPA immunity, present substantial proof that thee is a split within the Circuits, one that this Court should resolve in favor of McQuiston and *Acorn*.

Nevertheless, the Solicitor General at p.5 of Memorandum flatly states, "The decision in *Acorn* is not relevant to the issue presented by petitioner. Nothing in *Acorn* or DPA limits the government's power to terminate an overdue contract." The Solicitor

---

[6] "As the *quid pro quo* for performance of the contracts, defense contractors are protected from 'liab(ility) for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with...this Act.' * * * It is indisputable that the statutory ancestors of Section 707 only immunized contractors from liability for breach of contract damages; the law was explicit on that point. 'No person..shall be held liable for damages or penalties *for any default under any contract or order* which shall result directly or indirectly from his compliance with...this section.' * * * [A] number of references in the statutory history about the time the statute was reenacted as the DPA of 1950 indicate a desire by Congress not to limit the immunity to contractual breaches. For example * * *:

'The first sentence of Section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, *under contract or otherwise*, as the result of compliance with * * * the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.' S. Rep No 1599, 82d Cong, 2d Sess, 1952 U.S. Code Cong & Ad News 1789, 1818 (emphasis added)

"The last sentence in the quoted section of the Senate Report is certainly consistent with the interpretation that no change was intended in the scope of Section 707." *Agent Orange*, 597 F Supp at 844

General makes two erroneous assumptions in these statements.

First, McQuiston never suggested that an *agency* cannot terminate a contract at will, even if the contract is *not* overdue. Clearly, an agency may terminate at will, but not for *penalty;* McQuiston's text said so at page 30.

Second, *Acorn* is precisely relevant to an agency's DPA contract because the DPA statute (50 U.S.C. App. §2152(a)) prescribes that an agency shall be treated exactly like any *other* contractor and *not* like an imperial sovereign. Thus the Solicitor General's term "the government's power", rather than "a contractor's power" or "an agency's power", implies a boldly-presumptuous appropriation of sovereign power which DPA specifically prohibits.

4. The Solicitor General newly raises facts allegedly decided by ASBCA and thereafter argues that these facts may not be redetermined by any reviewing court as the gravamen of why certiorari should not be granted in this case. This argument compels a specific reply because it goes beyond the Questions McQuiston presented to this Court.

For the Solicitor General to argue that ASBCA's findings of fact are final and binding upon any court with jurisdiction requires *first* that ASBCA was properly authorized to make such findings,[7] and *second* that a finding of ASBCA properly binds a court of the United States under the Constitution and laws of the United States. These prerequisites are the Questions which McQuiston presented to this Court, answers to which are required *before* reaching the Solicitor General's question relative to the support in the record for the ASBCA findings.

The Solicitor General cites *United States v. Utah Construction &*

---

[7]ASBCA recognized that the agency's allegation of McQuiston's default was an agency claim *against a contractor,* and such jurisdiction in ASBCA for pre-CDA cases was questionable. *McDonnell-Douglas Corp,* 83-1 BCA 16,377 (1983), citing *Woods Hole v. U.S.,* 677 F2d 149 (1 Cir 1982) (no jurisdiction for agency claims). ASBCA in *McDonnell* cited *McQuiston* for authority supporting jurisdiction, and refused to follow *Woods Hole.*

Mining Co., 384 U.S. 394 (1966) for the proposition that factual issues concerning government contracts resolved by an administrative board are not to be tried *de novo* by a reviewing court. This argument is spurious in the present context and seriously misleads the Court, for *Utah* concerned a *consensual* contract in which the contractor had *voluntarily* limited its remedies and choice of forum. The present controversy arises, by stark contrast, from a *dictated* undertaking recognized by the courts in *Roxford Knitting v. Moore & Tierney*, 265 F. 177 (2d Cir. 1920) and in *Eastern* at 994 as being non-consensual despite being expressed in the format of a bilateral contract. McQuiston was thus forced to litigate in a non-Article III forum in circumstances utterly different from the consensual contracts containing "disputes" clauses that were interpreted by this Court in a famous trio of cases: *Utah; United States v.* Bianchi, 373 U.S. 709 (1963); *United States v. Grace & Sons, Inc.*, 384 U.S. 424 (1966).

Nevertheless, it is McQuiston's belief that the flat statements the Solicitor General alleges from the record are contradicted by *other* flat statements *also* found in the record.[8] To the extent that the ASBCA opinion is self-contradictory regarding the necessary facts, it will *not* support agency allegations that McQuiston was derelict per DPA or acted venally.

The gravamen of the *factual* question raised by the Solicitor General is: Assuming that the *quid pro quo* immunity granted McQuiston by the President is voidable by the agency party to the contract-in-commerce after value was received, do the facts on record support conclusions that the immunity *should* be voided and penalties *should* be imposed against McQuiston?

To void the immunity, the Solicitor General alleged:

> "Because the sales price was higher under the second contract, petitioner used relays he had ordered for the contract at issue in networks delivered under the second contract (A-27)." Mem. at 1-2.

---

[8]It appears that the ASBCA intended to make its decision internally contradictory, and thereby reversible on factual and legal grounds.

But McQuiston may have delivered networks simply to comply with orders he received from the Command, instead of for the venality alleged.

In examining the record for facts supporting the agency, we find only that McQuiston believed that the price charged him for the relays on both contracts would be exactly the same. (A-27, #27) *Per se,* there would be no advantage to incorporating relays from one contract into networks on another contract.

The price differential between these contracts would be attributable to the variation-in-quantity, date-of-order, and place-of-delivery. There is no evidence in the record which allocates the cost of goods sold and the overhead to the two unequal contracts. The production history (A-4) shows a great variation in price caused by quantity, time variables and place-of-delivery. Without an audit there is no clear proof of which contract was more profitable. Finally, regularity of conduct is *presumed* in the face of a statute like DPA providing for heavy penalties for misconduct. Thus the record will not support the Solicitor General's bare allegation of venality as improper conduct. There is no *prima facie* case.[9]

If the record had contained evidence supporting a *prima facie* case of venality, then McQuiston would have been allowed to present witnesses showing that his deliveries were solely at the discretion and under the control of the Command. The record (Tr at 1836-1849) shows McQuiston was first promised a hearing to present his witnesses on this issue ("Judge Gomez: I'll see you at the next session."), but the record also shows that ASBCA thereafter

---

[9]In *Village of Arlington Hts v. Metro Housing Dev,* 429 U.S. 252, 264-268 (1977) this Court prescribed a procedure to determine which alternative motivation was dispositive. More fully explained in *Mt Healthy v. Doyle,* 429 U.S. 274, 287 (1977), it briefly is:

1. The party alleging an invidious act must establish a *prima facie* case, showing that the intention to act invidiously was a substantial factor in the event that took place.

2. The alleging party having carried the burden to establish the *prima facie* case, the injuring party then must show by a preponderance of the evidence that it would have acted the same even without the invidious act, and if so the act is deemed not to be causative.

and *sua sponte* prohibited McQuiston from presenting the witnesses.

Nevertheless, the record *does* show that McQuiston delivered Networks in accordance with the terms of the contracts and under the close supervision of agency overseers, implying that the deliveries were *proper* or else the overseers would not have accepted them (A-27, #27 & 28). See also Pet. at 31-32. Venality could not affect the schedule.

Similarly, the Solicitor General alleged:

> "Petitioner did not seek government assistance in obtaining delivery of the relays under the DPS until after the delivery date had passed (A-44)." Mem. at 2.

This statement is *belied* by specific ASBCA findings which the Solicitor General also urged upon this court.[10] They say McQuiston timely and repeatedly sought assistance, before the alleged Oct 16, 1979 contract date was reached.

Obviously the ASBCA conclusions (A-44 & 45) conflict with the ASBCA findings (A-31 & 36). The record proves no *prima facie* case that McQuiston invidiously neglected the DPA process.

---

[10] "[Appellant] expected Kilovac to meet the scheduled deliveries with 'little or no problem whatsoever.' (A-26, #26)

"Appellant completed delivery on contract -0621 on 15 June, 1979 * * *." (A-27, #27)

"It first became apparent to appellant that deliveries under the instant contract might require priority assistance when it received a 24 August 1979 letter from Kilovac * * *." (A-31, #33)

"We have no doubt that appellant, accordingly, was capable of delivering the balance within the remaining two months." (A-40)

"Troubled by Kilovac's opinion that production could not be required except in time of war, appellant asked the DCASR office [27 Aug, 1979] to send Kilovac a copy of the DPS bulletin. * * * On 13 Sept 1979, * * * [o]ne of the DCASR representatives requested that appellant obtain 3 other sources to facilitate the processing of a * * * priority assistance action. The 3 other sources were required because DCASR no longer processed requests involving sole sources; however, the DCASR representative stated that he would talk to Kilovac, and see if just "jawboning" would help the situation." (A-31, #33 & 34; A-34, #38)

"The DCASR representative indicated [to Kilovac] that the Government would not tell them how to run their business." (A-36, #41)

Nevertheless, the *style* of attack in the Solicitor General's Memorandum clearly demonstrates the urgent necessity for this Court to grant certiorari in this case and settle *authoritatively* the immunity rights of DPA contractors.

5. To declare the rights of DPA contractors, McQuiston prays this court to grant certiorari for both Questions Presented, vacate the judgement of the Court of Appeals for the Federal Circuit and ASBCA, and remand for *de novo* consideration in an Article III court (CAFC), ordering the court to consider in light of *Acorn Iron v. Bethlehem Steel Co,* 96 F Supp 481 (E.D. Penn 1951) that contract-clause default *penalties* may not be assessed against DPA contractors by any person, including agencies of the United States, as defined by DPA in Sections 2152(a) & 2156 of Title 50 Appendix, United States Code, notwithstanding any penalty clause which may have been present in the DPA contract.

To declare the rights of all government contractors, McQuiston prays this court to prescribe additionally:

Commercial contract disputes of the United States are henceforth to be afforded the right of *de novo* review in the *initial* court of the United States, analogous to the review rights for disputes between parties not agencies of the United States. The right to such analogous review may not be impaired by the United States or its agents. However, the parties may elect to waive the review-right if waiver is freely given.

Respectfully submitted,

Date: February 15, 1985

B. Alan Dickson
Kaufman Franklin & Dickson
Attorneys for Petitioner